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CURRENT EVENTS.

THE TRUE LAWYER—THE ETHICS OF ADVOCACY.—We have read with much pleasure the address of Hon. Geo. W. McCrary to the Kansas City Bar Association, on the constituent elements and normal characteristics of the "True Lawyer." On the ethics of the profession Judge McCrary takes high ground. Although he hardly expects the lawyer to be "the faultless monster which the world n'er saw," he requires of him many excellencies which, it is to be feared, are not generally attained by the average practitioner. "The true lawyer is a peace maker. * * * * The true rule on this subject seems to be this: Always exhaust all reasonable efforts in the direction of compromise, but if all such efforts fail, and a law suit is inevitable, then the lawyer should prepare for it with the utmost care, and contest it fairly and honestly, with all his might."

On a much vexed question Judge McCrary's trumpet gives no uncertain sound. He says: "Perhaps you will ask me that old question, Is there no limit to the loyalty of the lawyer to his client? Must he advocate a cause that he knows to be wrong, or defend an act that he knows to be dishonest? I answer, there is, there must be, a limit beyond which the advocate cannot go. A lawyer should never be the tool of an unscrupulous client. If he is asked to aid a rascal in an effort to oppress or wrong another, he must refuse. No fee should be sufficient to hire him for such a work."

To this we venture to add that a lawyer should always bear in mind that he is a free agent; he is under no obligation, professional, social, civil, or religious, to devote his talents and learning to the aid of any cause which, in his own secret soul, he believes to be iniquitous. But he should carefully consider beforehand all the moral aspects of the law suit. It is not incumbent upon him to presume against his client's fair dealing. Like other men his client is entitled to the proverbial presumption of innocence. If the case is fair upon its face, and the counsel has no good reason *aliunde* to suspect his client's good faith, he is justified in accepting the cause. The true guides in such questions are common sense and honor.

When, however, the relation of counsel and client is established, new duties are assumed, and new interests have become involved, a retrograde movement, with honor, becomes difficult. When and under what circumstances, can a lawyer throw up his client's case upon becoming satisfied, in the course of the proceedings, that his client's conduct has been base, fraudulent, iniquitous or criminal? And what degree of moral obliquity in the client will justify so extreme a proceeding on the part of the counsel? These questions Judge McCrary neither asks nor answers, and yet they are essentially different from the question which he solves so satisfactorily. It is one thing to decline a professional engagement for reasons satisfactory to yourself, and quite another to break an engagement and repudiate a contract. It is manifest that whenever a case occurs in which a lawyer is placed under the necessity of either, co-operating with a probable villain in the perpetration of an outrage and a fraud, or of repudiating a deliberate engagement, there arises a case of conscience which must be settled upon its own facts, and upon very clear and unequivocal evidence of those facts. If the client is a villain, and his scheme utterly iniquitous, the counsel can honorably retire from the case whenever he has made the discovery. If, on the other hand, he is mistaken, and the transaction, though even a trifle shady, proves to be sufficiently legitimate for honorable advocacy, he has done a wrong and inflicted an injury upon one who has trusted him, if he breaks his engagement and throws up the case. Where the line must be drawn must depend primarily upon the facts of the case, and secondly upon the degree of the obligation which a lawyer assumes in accepting the function of advocate and counsel, or, in other words, how far the "loyalty of counsel to client" constrains him. On this subject, as on most others, the authorities differ.

Lord Brougham's views of the duties of an advocate, were extreme and radical. In Queen Caroline's case he said: "An advocate

—by the sacred duty of his connection with his client, knows in the discharge of that office but one person in the world—that client—and none other. To serve that client by all expedient means; to protect that client at all hazards and costs to all others (even the party already injured), and amongst others to himself, is the highest and most unquestioned of his duties."

Lord Brougham's authority on this point is very generally questioned; he was defending the character of a woman against the inveterate enmity of a great king, and naturally assumed to himself broader privileges than under other circumstances he would have accorded to others. Under the circumstances, and for that particular case, he was fully justified in his statement, for it is not, perhaps, going too far to say that when the honor of a woman or the life of a man is at stake, a lawyer is justified in resorting to "all expedient means," to any and every resource that "God and nature has put into his hands."

Under less extreme circumstances, of course the rule should be very different, but no one can *ex cathedra* announce any general rule applicable to all cases except this; that no lawyer can honorably take or hold any professional function, the exercise of which will shock an enlightened conscience.

PRESIDENTIAL SUCCESSION.— The example of Judge McCrary induces us to remark upon a very important politico-legal matter. He says: "No government is perfect unless it provides a tribunal for the final settlement of every controversy that can arise between its citizens concerning their rights. * * * * Our own government has met this demand by systems of State and Federal courts and special tribunals, which, so far as I know, provide for the settlement of all disputes, save only one—and that of paramount importance—a dispute as to a presidential election. I turn aside here just long enough to say that it is a reproach to American statesmanship, that no tribunal, judicial or otherwise, has yet been constituted with undoubted authority to pass upon the validity of an election of a presidential elector. Twice in our history have we been warned of the great danger to the peace of our country, if not, indeed, to the very existence of our institutions, resulting from this omission. Nothing is more certain than that, sooner or later, we shall split upon this rock if we go on without an amendment either of the constitution or of the law; and yet nothing is done, because the men who, for the time being, hold the interests of fifty million people in their hands, will agree to nothing until they are sure it will help their party in the next election. It will take a broader statesmanship than this to save our country from a great peril." Concurring fully with Judge McCrary in the views he expresses on this subject we take the liberty to add, although it may seem to be travelling out of the record, and invading the province of political papers that the apathy on this subject of the American people and of Congress has long been a matter of profound astonishment to us. After the notable *casus improvisus* of the Hayes-Tilden affair of 1876, and the exceedingly narrow escape the country then had from dangerous convulsions and even civil war, we thought that the wise men of both political parties would make haste to guard the country against the possible recurrence of such a crisis, and expected from month to month that some feasible and definite plan would be proposed and adopted. Nothing was done then, nor was anything effected in 1884-5, when the very close contest between Cleveland and Blaine indicated the possibility of another such crisis as that of 1876. Congress has done nothing, and the highest office in the nation remains to this day the only franchise, the right to which cannot be adjudicated in case of contest by any tribunal, judicial or political.

The American people have been in many respects very fortunate, but it is not becoming in a great nation to trust too much to luck, and if another such crisis as that of 1876 shall again occur and the country pass safely through, it can only thank that special Providence which takes such very good care of children and fools.

NOTES OF RECENT DECISIONS.

WARRANTED SATISFACTORY IN EVERY RESPECT.—The active competition of travelling salesmen who pervade the whole country, who "sell" every town they come into, and in the heat of their rivalry recklessly warrant everything they sell, produces quite a little crop of law suits. A recent case in Vermont[1] is quite interesting as illustrating the law controlling contracts of this character. Mr. Briggs ordered from McClure a parlor organ, which in due season Bradley, the agent of the vendor, brought to Briggs' house, who had, however, in the interval, bought another organ from a rival establishment, and refused to receive the organ or to allow Bradley to set it up in his house. Thereupon Bradley agreed with Briggs that if he, Bradley, were allowed to set up the organ and Briggs was not satisfied with it, the trade should be thrown up. "Afterwards," in the language of the court, "defendant thought, though without cause, that he was dissatisfied with the tone of the organ." A law-suit ensued and plaintiff claimed that the delivery was under the original contract, because Bradley had no right to vary it, and if he had, the defendant having no cause to be dissatisfied, was bound to be satisfied. The Supreme Court held that the action (book account) could not be maintained without proof of actual delivery; that Bradley's delivery of the organ was conditional, that plaintiff could not adopt the delivery part of Bradley's contract without adopting all of it; that that contract was, not that the organ should, upon trial, be found in accordance with the original contract, but that it should be regarded by the purchaser as satisfactory to him; that he was under that contract the sole judge of his own satisfaction, and if he thought he was dissatisfied with the tone of the organ, he was so, for as a man 'thinketh in his heart, so is he.'" The court, however, excludes bad faith, for if the vendee feigns to be dissatisfied, the excuse is not available to defeat his liability. In another case,[2] the court held that the defendant, under a contract of like character, was bound to bring to the trial of the article sold, only "honesty of purpose, and judgment according to his capacity to ascertain his own wishes."

In a case upon a contract to pay, "if satisfied with the pans," the court says: "We think the ruling of the court, that the defendant had no right to say arbitrarily and without cause that he was dissatisfied, and would not pay for the pans, was sensible and sound."[3]

In a Massachusetts case in which plaintiff had agreed to make a book-case to be approved by a named person, it was held that he was bound to perform his contract according to its literal terms; that although it may have been indiscreet for him to have made a contract dependant, so far as his pay was concerned, upon a contingency so hazardous and doubtful as the approval of a party interested; having made such a contract he was bound by it.[4] In another Massachusetts case,[5] plaintiff agreed to make a suit of clothes that should be satisfactory to defendant. The latter said he was not satisfied, and the court held that the plaintiff could not recover, and that defendant was not bound by a usage of the trade which allowed tailors to have clothes tried on and then alter them if they appeared imperfect. The court says: "When an express contract like that shown in the present case was proved to have been made between the parties, it was not competent to control it by evidence of a usage." On the subject of usage the rule is, that it never is nor ought to be permitted to contradict a settled rule of commercial law;[6] nor *a fortiori*, a special contract.

The strongest case on the subject is that of a sculptor, who having agreed to make for a widow a bust of her deceased husband, which "she was not to take unless it satisfied her." The bust when completed, it was conceded, was a fine work of art, reproducing precisely the features of the deceased, was unobjectionable in every respect except one. It did not have the expression of the deceased when living, which was caused by no imperfection

[1] McClure v. Briggs, East. Rep. Vol. IV, No. 6, p. 435.

[2] Hartford Manufacturing Company v. Brush, 43 Vt. 528; See also Dagget v. Johnson, 49 Vt. 345.

[3] Daggett v. Johnson, *supra*.

[4] McCarren v. McNulty, 7 Gray, 139.

[5] Brown v. Foster, 113 Mass. 136.

[6] Frith v. Barker, 2 Johns. 334, per Kent, C. J. See also, Edie v. East India Co., 2 Burr. 1216; Thompson v. Ashton, 14 Johns. 316; Dickenson v. Gay, 7 Allen, 29.

of the work but by the nature of the material. Mrs. Clark, the widow, was not satisfied. The court says: "The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with but one that she would be satisfied with."[7] In other words, if Mrs. Clark honestly expected the sculptor to do an impossible thing, he has no right under his contract to be paid unless he does it.

In a recent Pennsylvania case,[8] Thayer agreed to put into Singerly's building a "patent hydraulic hoist," or elevator, "warranted satisfactory in every respect." After trying it, Singerly refused to accept it. The court held that he could not be compelled to take and pay for it, adding: "To justify a refusal to accept the elevator on the ground that it was not satisfactory, the objection must be made in good faith. It must not be merely capricious."[9]

It is immaterial whether the party had good reason to be satisfied or not, whether his dissatisfaction was the result of right reason, common sense, prejudice, or caprice, the true question is, whether he was really dissatisfied, or only pretended to be so in order to vacate the contract. In all the cases which we have seen and especially in those in which the satisfaction was a matter of taste, as in the case of the bust,[10] caprice or prejudice were clearly admissible to justify dissatisfaction. And so also even in the most prosaic of business operations, because the contract of the other party is to satisfy the purchaser, not to furnish something that every body in the world would say ought to do so. It is true that what may be called willful caprice may indicate that the dissatisfaction is feigned and fraudulently put on to avoid the contract. That however is a matter of evidence, and the question is for the jury whether the refusal of the purchaser to take the article was *bona fide* or not. The presumption assuredly would be that having bought the article, or contracted to have it made, he really wanted it and the burden of proof would be on the vendor or maker to show; not that the article was fully up to the standard required by the contract, not that every body but the vendee thought so, but that there was sufficient evidence to satisfy a jury that the vendee was merely pretending discontent with his purchase, in order to avoid the necessity of taking and paying for it.

When the contract is in other terms and does not express or imply the satisfaction of the vendee with the article, the construction is controlled by other considerations. Thus for example a contract for the sale of a mill upon condition that it shall "work well," is not dependant upon the opinion of the purchaser as to whether it "worked well" or not, bnt upon general evidence, of experts and others upon that question.[11] If however, a limit, in a point of time, is placed by the contract upon the vendee's right to exercise his power of rejection or caprice, that limit must prevail, although the contract was that the article sold should give the vendee "entire satisfaction."[12]

The result of all the cases is that when a vendor or maker contracts that his article shall afford the other party satisfaction, it must have that effect, for unless he can show to the jury that the other party is merely pretending to be dissatisfied, he cannot enforce the contract.

[7] Zaleski v. Clark, 44 Conn. 218.

[8] Singerly v. Thayer, Am. Law Reg. Vol. 25, p. 14; s. c. 3 East. Repr. 287, 292.

[9] Andrews v. Belfield, 2 C. B. (N. S.), 779; See also, Gibson v. Cranage, 39 Mich. 49; Hoffman v. Gallagher, 6 Daly, 42.

[10] Zaleski v. Clark, *supra*.

[11] McClamrock v. Flint, 101 Ind. 278;; See also Clar k v. Rice, 46 Mich. 308.

[12] Barlow v. Thompson, 46 Ind. 384.

PURCHASIN G MORTGAGED REAL ESTATE.

Many importa nt questions grow out of the transfer of real estate upon which there is a mortgage not due. The frequency of such transfers, especially in the west, renders the subject very important.

In this paper we will consider the rights and liabilities of the parties to su ch a transaction.

A conveyance subject to a mortgage, but without an express stipulati on that the grantee shall assume and pay the debt, leaves the

grantor primarily liable for any deficiency there may be after the sale of the property.[1]

The land itself remains as effectually charged with the incumbrance of the debt as if the purchaser had expressly assumed the payment or himself given the mortgage.[2] The difference between buying subject to a mortgage and assuming payment of the debt is, that in one case the purchaser becomes personally liable and not in the other.[3]

In both cases the land remains charged with the debt, and the purchaser cannot deny its validity.[4]

In the language of Staples, J.:[5] "The fair inference is that the purchaser does not pay the vendor the full value of the property and that the amount of the mortgage debt is reserved in his hands as so much purchase money for the purpose of discharging the lien. In such case the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment. As between the vendor and purchaser of the equity of redemption, the land is the primary fund for the liquidation of the incumbrance."

The personal liability of the grantee will depend upon the terms of reference thereto in the deed, and the intention of the parties as shown from the entire instrument.[6]

Although no precise words need be used,[7] the intention to impose such an obligation upon the grantee must clearly appear. He must assume to pay the debt and make the obligation his own.[8] Said Bacon, J.:[9] "To constitute a personal obligation upon a party taking a conveyance with an outstanding incumbrance binding him to its absolute payment, I think something more is required than a mere statement that it is subject to the mortgage existing upon it. The natural inference from such language, it seems to me would be, that the purchaser takes the property encumbered to the extent stated; that he purchases only the equity of redemption of the mortgagor, and that the covenant of warranty, on the part of the grantor is qualified by such antecedent clause so as to exempt the mortgage from its operation, and that the purchaser takes the chance of realizing enough out of the property, over and above the encumbrance, when it comes to be enforced to secure to him the balance of the purchase money he has invested by way of advance, or, as in this case, as an indemnity for an existing indebtedness, on the part of the grantor To create such a liability as is sought to be enforced here, either the language of the deed should be 'subject to payment of the outstanding indebtedness,' or that 'it forms a part of the purchase money which the grantee in the deed assumes to pay,' or some equivalent expression which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other. Wherever a party is thus sought to be charged with a duty primarily resting upon another, it must arise either by his express assumption, or from an obligation which the law implies, and casts upon him, from the words of his contract or the language of his acts."

Burke v. Gummey,[10] seems to hold that a vendee of property taken subject to a mortgage makes the debt his own, so that any

[1] Fowler v. Fay, 62 Ill. 375; Comstock v. Hitt, 37 Ill. 542; Dunn v. Rogers, 43 Ill. 260; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Drury v. Tremont Improvement Co. 13 Allen, 168; Strong v. Converse, 8 Allen, 557; Bumgardner v. Allen, 6 Mumf. (Va.), 439; Foster v. Atwater, 42 Conn. 244; Walker v. Goldsmith, 7 Oreg. 161; Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97; Trotter v. Hughes, 12 N. Y. 74: Belmont v. Coman, 22 N. Y. 438; Binsse v. Paige, 1 Keyes (N. Y.), 87; Stebbins v. Hall, 29 Barb. 524; Tillotson v. Boyd, 4 Sandf. 516; Murray v. Smith, 1 Duer. 412; Johnson v. Monell, 13 Ia. 300: Hull v. Alexander, 26 Iowa, 569; Lewis v. Day, 53 Iowa, 575: Winan v. Wilkie, 41 Mich. 264: Tanguay v. Felthousen, 45 Wis. 30; Campbell v. Patterson, 58 Ind. 66; Moore's Appeal, 88 Pa. St. 450.

[2] Sweetzer v. Jones, 35 Vt. 317; Cobb v. Dyer, 69 Me. 498; Fuller v. Hunt, 48 Ia. 163; Manwaining v. Powell, 40 Mich. 671; Berry v. Whitney, 40 Mich. 65.

[3] Winan v. Wilkie, 41 Mich. 264; Strohaver v. Voltz, 42 Mich. 444; Woodbury v. Swan, 58 N. H. 380;

[4] Greither v. Alexander, 15 Ia. 471; Green v. Turner, 38 Ia. 112; Perry v. Kearns, 13 Ia. 174; Pennell v. Boyd, 33 N. J. Eq. 190: Dolman v. Cook, 14 N. J. Eq. 56; Conover v. Hobart, 24 N. J. Eq. 120; Lee v. Steiger, 30 N. J. Eq. 610: Fuller v. Hunt, 48 Ia. 163.

[5] Gayle v. Wilson, 30 Gratt. 166; Daniels v. Leitch, 13 Gratt. 195, 206; Jumel v. Jumel, 7 Paige, 591; Fuller v. Hunt, 48 Ia. 163; Green v. Turner, 38 Ia. 112; Shuler v. Hardin, 25 Ind. 386; Russell v. Allen, 10 Paige, 249; Savings Bank v. Grant, 41 Mich. 101; Dickason v. Williams, 129 Mass. 182.

[6] Fairchild v. Lynch, 42 N. Y. Sup. Ct. 265.

[7] Belmont v. Comans, 22 N. Y. 438.

[8] Stebbins v. Hall, 29 Barb. 524.

[9] Stebbins v. Hall, *supra*. See also Tillotson v. Boyd, 4 Sandf. 516; Murray v. Smith, 1 Duer, 412.

[10] 49 Pa. St. 518.

balance may be recovered in an action against him by the vendor.

"As we understand," said Seevers, J.,[11] "this case only holds that the property constitutes the primary fund for the payment of the mortgage."

Several other cases have been cited as at variance with the general rule, but upon a careful examination it will be seen, that in each instance the deed contained a clause expressly providing for the assumption of the mortgage.

Thus in Halsey v. Reed,[12] the language from which the liability of the grantee was held to arise was, "which said mortgage is assumed by the party of the second part, and the amount thereof constitutes part of the consideration of this conveyance, and is deducted therefrom."

In Cornell v. Prescott,[13] the purchaser not only assumed the liability, but executed a bond of indemnity to the grantor to protect him against his liability on the bond.

In Marsh v. Pike,[14] the purchase was subject to the mortgage, "the amount of which was deducted from the purchase money."

In Flagg v. Thurber,[15] the conveyance was made subject to one-half of a mortgage "which the said party of the second part assumes to pay and which is part of the consideration money mentioned above."

In Blyer v. Monholland,[16] the deed was subject to a mortgage "which the said party of the second part hereby assumes and agrees to pay."

A stipulation that a deed is made "subject to the payment" of an outstanding indebtedness binds the grantee personally for the debt.[17]

Although no particular form or words is necessary, the following is probably as good as can be used. "Said premises are hereby conveyed subject to a certain mortgage, dated &c., and recorded &c., and of which the sum of $——is now due, or unpaid, which mortgage the said grantee, his heirs and assigns are to assume and pay, the said amount forming a part of the above named consideration."[18]

The purchase of an equity of redemption is equivalent to purchasing subject to a mortgage.[19] Such a purchaser is not entitled to the benefit of collateral securities placed with the mortgagee by the vendor after the execution of the mortgage.[20] He may give up the land at any time in satisfaction of the lien.[21] When land is conveyed subject to a mortgage and the amount of the incumbrance is deducted from the consideration, it is very important that the mortgage be excepted from the covenants of warranty, otherwise the grantor may be held to have covenanted against the mortgage, even though the covenant against encumbrances excepted the mortgaged.[22]

The mere fact that the incumbrance is mentioned in a deed to which reference is made, will not avail to qualify the covenants of the deed.[23]

Nor is oral evidence admissible to prove that the parties intended or agreed that the incumbrance should be excepted from the covenant.[24]

The sale and conveyance of land with covenants of warranty, subject however, to a prior mortgage, does not of itself amount in law to a promise to pay such incumbrance and discharge the mortgage.[25]

A mere verbal promise by the grantee to

[11] 5 N. W. Rep. 785.
[12] 9 Paige, 446.
[13] 2 Barb. 16.
[14] 10 Paige, 595.
[15] 14 Barb. 196. The judgment in this case was modified in 5 Selden, 483; but the principle was not doubted.
[16] 2 Sandf. Ch. 478.
[17] Stebbins v. Hall, 29 Barb. 524.
[18] Crocker's Com. Forms, 38; 1 Jones on Mortgages, § 735.
[19] Russell v. Allen, 10 Paige, 249; Vanderkemp v. Shelton, 11 Paige, 28; Lovelac v. Webb, 62 Ala. 271; Mathews v. Aiken, 1 N. Y. 595; Smith v. Trusow, 84 N. Y. 660.
[20] Brewer v. Staples, 3 Sandf. Ch. 579; Stevens v. Church, 41 Conn. 369.
[21] Tichenor v. Dodd, 3 Green (N. J.), Ch. 454.
[22] Esterbrook v. Smith, 6 Gray, 572.
[23] Harlow v. Thomas, 15 Pick. 66.
[24] Spurr v. Andrew, 6 Allen, 420. Under a covenant that the premises "are free from all incumbrance except as aforesaid," the grantee cannot, in an action upon the covenant, recover the amount of accrued interest which he had been obliged to pay to prevent foreclosure. Shanahan v. Peary, 130 Mass. 460.
[25] Johnson v. Monnell, 13 Iowa, 300; Aufricht v. Northup, 20 Iowa, 61; Hull v. Alexander, 26 Iowa, 569; Bensse v. Paige, 1 Keyes (N. Y.) 87; Strong v. Converse, 8 Allen, 557; Trotter v. Hughes. 2 Kerr, 74; Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 Ill. 375. A purchaser of mortgaged property taking a conveyance subsequent thereto takes subject to the mortgage provision relative to the order in which securities should be resorted to. Mickle v. Gould, 3 N. W. Rep. 961.

assume and pay a mortgage, is valid, and may be enforced by the grantor or holder of the mortgage.[26]

By accepting a deed containing an obligation clause, the grantee becomes liable to pay an existing mortgage. It is not necessary that he should sign an obligation.[27] He becomes as effectually bound as if he had signed the deed.[28] When it is not the intention that ths grantee shall assume the incumbrance he may refuse to accept a deed containing such a clause.[29] When he accepts a deed by which he is made to assume such a personal liability and does not discover it until a judgment is obtained against him for a deficiency, he may have the judgment opened and show, from the contract of sale, that he was not liable for such deficiency.[30] But this cannot be shown by parol evidence.[31] The instrument may be reformed by striking out the assumption clause, unless an estoppel has arisen in favor of third parties.[32]

But if he has made payment of interest without complaining of the assumption clause, he cannot afterwards urge that it was fraudulently inserted in the deed.[33] So, when the written contract of sale, provides that the purchaser shall assume and pay the existing mortgage, but the deed omits to provide for it, it seems that the contract may be enforced specifically, when it appears that there will be a deficiency, and the amount is definitely ascertained.[34] When the assumption clause is ambiguous, evidence, showing the value of the premises, or the agreed consideration therefor, or whether any part was retained by the grantee for the purpose of paying the indebtedness, is material and admissible.[35]

An agreement by which the amount of a mortgage is to be paid as a part of the purchase money is, in effect, an assumption of the mortgage. The mortgage is a charge upon the purchase money, as well as upon the land.[36]

When a purchaser assumes a mortgage, he becomes, as to the mortgagee, the principal debtor, and the mortgagor a surety.[37] But

[26] Putney v. Farnham, 27 Wis. 187; Bolles v. Beach, 22 N. J. L. 680; Wilson v. King, 23 N. J. Eq. 150; Lamb v. Tucker, 42 Iowa 118; Merriman v. Moare, 90 Pa. St. 78.

[27] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Record v. Saunderson, 44 N. Y. 179; Lock v. Homer, 131 Mass. 93, 102; Dickason v. Williams, 129 Mass. 182; Urgwhart v. Brayton, 12 R. I. 169; Spaulding v. Hallenbeck, 35 N. Y. 204; Wales v. Sherwood, 1 Abb. (N. Y.) N. C. 101 and note; Klein v. Isaacs, 8 Mo. App. 568; Bishop v. Douglass, 25 Wis. 696; Taylor v. Whitmore, 35 Mich. 97; Unger v. Smith, 44 Mich. 22.

[28] Gaffney v. Hicks, 131 Mass. 124; Furnass v. Durgin, 119 Mass. 500; Lock v. Homer, 131 Mass. 93; Pike v. Brown, 7 Cush. 133; Braman v. Dowse, 12 Cush. 227; Crawford v. Edwards, 33 Mich. 354; Trotter v. Hughes, 12 N. Y. 74; Franchild v. Lynch, 46 N. Y. Sup. Ct. 1; Huylar v. Atwood, 26 N. J. Eq. 504; Finley v. Simpson, 22 N. J. L. 311; Schmucker v. Sibert, 18 Kas. 104; Halsey v. Reed, 9 Paige 446; Curtis v. Tyler, 9 Paige 432; Ferris v. Crawford 2 Denio. 595; Carley v. Fox, 38 Mich. 388; Rawsons Adm. v. Copeland, 2 Sandf. Ch. 251.

[29] Lewis v. Day, 5 N. W. Rep. 785; Manhattan Life Ins. Co. v. Crawford, 9 Abb. N. C. (N. Y.) 365.

[30] Northern Dispensary of N. Y. v. Merriam, 59 How. (N. Y.) P. R. 226; DeYermand v. Chamberlain, 22 Hun. 110; Waring v. Sanborn, 82 N. Y. 604; O'Neill v. Clark, 33 N. J. Eq. 444.

[31] Muhlig v. Fiske, 131 Mass. 110; Coldge v. Smith, 129 Mass. 554; Blyer v. Monhalland, 2 Sandf. Ch. 478.

[32] Real Estate Trust Co. v. Balch, 45 N. Y. Sup. Ct. 528; Kilmer v. Smith, 77 N. Y. 226.

[33] Miller v. Thompson, 34 Mich. 10; Smith v. Graham, 34 Mich. 302.

[34] Slauson v. Watkins, 44 N. Y. Sup. Ct. 73.

[35] Tichnor v. Dodd, 3 Greenf. (N. J.) Ch. 454; A clause promising to pay is inconsistent with a pretended oral agreement that the grantor was to furnish the grantee with funds, with which to make such payment. Smith v. Ungor, 5 N. W. Rep. 1069. The agreement of the grantee may be wholly outside the instrument of conveyance. Schmucker v. Sibert, 18 Kas. 104; Colgin v. Henley 6 Leigh. (Va.) 85; Thayer v. Torrey, 37 N. J. L. 339.

[36] Tichnor v. Dodd, 3 Green. (N. J.) Ch. 454; Kennedy v. Brown, 61 Ala. 296; Urguhart v. Brayton, 12 R. I. 169; Thompson's Adm. v. Thompson, 4 Ohio St. 333; McMahan v. Stewart, 23 Ind. 590; Ferris v. Crawford, 2 Denio. 595. In Heid v. Freeland, 30 N. J. Eq. 591, the Vice Chancellor says: "There can be no doubt at this day, that where the purchaser of land incumbered by a mortgage, agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debts whether he agreed to do so by express words or not. The obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage, imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice, for it would seem to be almost intolerably unjust to permit him to keep back the vendor's debt and still be free from all liability for a failure to apply the money according to his promises."

[37] Wales v. Sherwood, 52 How. (N. Y.) Pr. 413; Calvo v. Davies, 8 Hun, 222; Comstock v. Drohan, 8 N. Y. Sup. Ct. 373; Marshal v. Davies, 78 N. Y. 414; Flogg v. Geltmacher, 98 Ill. 293; Fleishhauer v. Doeller, 9 Abb. N. C. 372; Cornell v. Prescott, 2 Barb. 16; Mutual L. Ins. Co. v. Davies, 44 N. Y. Sup. Ct. 172; At-

the mortgagee may treat both as principal debtors, and have a personal decree against both.[38] There are cases, holding that this relation of surety between the grantor and grantee does not involve the mortgagee in its legal effects, but that his rights remain unchanged. Both parties are as principals to him, and liable personally for the debt. As between the mortgagor and his grantee, the relation of surety exists, but it in no way affects the relation of mortgagor and mortgagee. "The mortgagee," says Lewis, P. J.,[39] "may therefore continue to hold the mortgagor as principal debtor, and, while he so holds him, there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the principal debtor in the relation of a principal to his surety."

Although the mortgagee may release the mortgagor from his personal liability without affecting the lien upon the land, or the personal liability of the grantee,[40] he cannot release the grantee without releasing the mortgagor who has become surety.[41]

Any material alteration of the mortgage contract will discharge the mortgagor, such, for instance, as the abrogation of a clause to the effect that, upon application and payment of a certain sum per acre, the mortgagee would release portions of the mortgaged premises.[42] So an extension of the time of payment without the consent of the mortgagor, discharges him from liability, and the holder of the mortgage cannot reserve his rights against the mortgagor, or surety, in the agreement of extension without the consent of the mortgagor.[43] Or a failure to foreclose upon maturity, upon being requested by the mortgagor to do so, on the ground that the property would depreciate in value.[44] But such notice is necessary.[45]

One who has assumed payment of a mortgage cannot contest its validity, or show that the amount assumed was not due upon it,[46] or that it was made without consideration,[47] or that the mortgagee has collateral security for the same debt,[48] or that the debt is different, or payable in a manner different from its terms,[49] or that there is a defect in its execution,[50] or that the mortgage debt was usurious.[51]

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lantic Dock Co. v. Leavitt, 54 N. Y. 35; Trotter v. Hughes, 12 N. Y. 74; Burr v. Beers, 24 N. Y. 178; Belmont v. Coman, 22 N. Y. 438; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Ruben v. Prindle, 44 Barb. 336; Johnson v. Zink, 52 Barb. 396; Ayers v. Dixon, 78 N. Y. 318; Marsh v. Pike, 10 Paige, 595; Willson v. Burton, 52 Vt. 394; Crenshaw v. Thackston, 14 S. C. 437.

[38] Corbett v. Waterman, 11 Iowa, 86; Hebert v. Doussan, 8 La. Ann. 267; Thompson v. Bertram, 14 Iowa, 476; James v. Day, 37 Iowa, 164; Waters v. Hubbard, 44 Conn. 340.

[39] Connecticut Mut. Life Ins. Co. v. Mayer, 8 Mo. App. 18. See also Corbett v. Waterman, 11 Iowa, 86; Crawford v. Edwards, 33 Mich. 354; Huyler v. Atwood, 26 N. J. Eq. 504; Meyer v. Lothrop, 10 Hun, 66, overruled by Paine v. Jones, 14 Hun, 577. But see Soheir v. Loring, 6 Cush. 537.

[40] Tripp v. Vincent, 3 Barb. Ch. 613.

[41] Paine v. Jones, 16 N. Y. 274; Mutual Life Ins. Co v. Davies, 44 N. Y. Sup. Ct. 172.

[42] Paine v. Jones, 76 N. Y. 274.

[43] Calvo v. Davies, 8 Hun (N. Y.), 222; affirmed 73 N. Y. 211; Mertz v. Todd, 36 Mich. 473.

[44] Remsen v. Beekman, 25 N. Y. 552; Russell v. Weinberg, 2 Abb. N. C. (N. Y.) 422.

[45] Hurd v. Callahan, 9 Abb. N. C. (N. Y.) 374.

[46] Scarry v. Eldridge, 63 Ind. 44; Ritter v. Phillips, 53 N. Y. 586; Johnson v. Parmely, 14 Hun, 398; Green v. Houston, 22 Kas. 35; Kennedy v. Brown, 61 Ala. 296. See Mansur v. Bartholomew, (Ind.) 8 Cent. L. J. 72.

[47] Crawford v. Edwards, 33 Mich. 354; Miller v. Thompson, 34 Mich. 10; Haile v. Nichols, 16 Hun, 37; Parkinson v. Sherman, 74 N. Y. 88; Cox v. Hoxie, 115 Mass. 120.

[48] Ferris v. Crawford, 2 Denio, 595.

[49] Klein v. Isaacs, 8 Mo. App. 568.

[50] Pidgeon v. Trustees, etc., 44 Ill. 501; Greither v. Alexander, 15 Iowa, 470. But see Goodman v. Randall, 44 Conn. 321.

[51] Hartley v. Harrison, 24 N. Y. 170; Ritter v. Phillips, 53 N. Y. 586; Shufelt v. Shufelt, 9 Paige, 137; Cope v. Wheeler, 41 N. Y. 303; Barthet v. Elias, 2 Abb. (N. Y.) N. C. 364; Sands v. Church, 6 N. Y. 347; Frost v. Shaw, 10 Iowa, 491; DeWolf v. Johnson, 10 Wheaton, 367; Cramer v. Lepper, 26 Ohio St. 59; Busby v. Finn, 1 Ohio St. 409; Bearce v. Barstow, 9 Mass. 45.

CONTEMPT OF COURT.

At common law, courts of justice have an unquestioned authority to punish persons for contempt of their rules and orders, for disobeying their process, and for disturbing them while in the performance of their judicial functions;[1] while many of the States of the Union, by their respective legislatures, have passed statutes conferring upon the courts the power to punish for contempt of their

[1] Espinasse's *Nisi Prius*, 334; Bacon's Ab. title Court, E.; Rolle's Ab. 219; 5 Ired. Rep. 199; 4 Black. Com. 124.

proceedings, rules, orders, and mandates. And the same authority to punish for contempt exists in the several Federal courts of the United States, and in the army and navy.[2] In the army, a court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings by any riot or disorder. In the navy, such punishment as an army court-martial may adjugde, may be inflicted on any person in the navy. The United States Court of Claims have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law.[3]

The several courts of the United States have power to punish, by fine or imprisonment, at the discretion of the court, all contempts of their authority.[4]

The district courts of the United States, while sitting as courts of bankruptcy, have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt, to the same extent that the Circuit Courts now have in any suit pending therein in equity.[5] But no register in bankruptcy shall have power to commit for contempt,[6] but when a person is examined before a register, who refuses to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish for contempt, provided such person is obliged by law to answer such question, or sign such examination.[7] An assignee in bankruptcy, who refuses to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court, may be punished as for a contempt of court.[8]

In 1772, before the adoption of the Federal Constitution, the judges of the Superior Court of Judicature of the Province of Massachusetts Bay, on the authority conferred by the Common Law, decided that where an attempt is made in court to snatch paper from the hands of the opposing party, is a contempt, for which a person may be committed to prison.[9]

In some of the United States, the power to punish for contempts is restricted to offenses committed by the officers of the court, or in its presence, or in disobedience of its orders, rules or mandates; while, on the other hand, no one is guilty of contempt for any publication made or act done out of court, unless it is in violation of such orders, rules or mandates.[10]

In order that a court may be protected for punishing for contempt of its authority, the case must come within the limits of its jurisdiction.[11]

Judge Bigelow said, in the case of Piper v. Pearson: "In all cases therefore where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is, whether he has acted without any jurisdiction over the subject matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined."[12] And the same judge continues: "If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser."[13]

It is the established doctrine in England and in some of the United States, that when a person is imprisoned for contempt of court, he cannot be discharged by another, when brought before him on a writ of *habeas corpus*. It belongs solely to the offended court, to judge of contempts, as well as what amounts to them; and no other court can in an indirect way, question or review, a decision on a

[2] Revised Statutes of the United States, §§, page 238, Art. 86; Ibid, page 277, Art. 8.
[3] Revised Stat. U. S. § 1070.
[4] Ibid. U. S. § 725; *ex parte*, Garland, 4 Wallace, 378; *ex parte* Robinson, 19 Wallace, 505; Allen's Case, 13 Blatchford, 271.
[5] Stat. U. S. passed March 1867, c. 176, § 1, page 517.
[6] Rev. Stat. U. S. § 4999; Ibid, § 5002.
[7] Ibid, U. S. § 5006.
[8] Ibid, U. S. § 5037; Ibid, § 5104.
[9] Thwing v. Dennie, Quincy Report, 338.
[10] Oswald Case, 4 Lloyd's Debates, 141.
[11] Piper v. Pearson, 2 Gray, 120, and cases cited.
[12] 1 Chitty. Pl. (6th Am. ed.), 90, 209-213: Beauvain v. Scott, 3 Campbell, 388; Ackerley v. Parkinson, 3 Mawle & Selwin, 425, 428; Allen v. Gray, 11 Ct. 95; Bigelow v. Fitch, 15 Johns. 121; Bigelow v. Stearns, 19 Johns. 39.
[13] 1 Chit. Pl. 210; 19 Johnson, 39; Clarke v. May, 2 Gray, 410.

contempt, made by another court, of competent jurisdiction.[14]

It is not within the judicial authority of a justice of the peace, to punish a witness, duly summoned before him, for contempt, After the case for which he is summoned is terminated, such witness will be discharged on *habeas corpus*, from imprisonment in default of payment of the fine imposed by such court for the alleged contempt.[15]

In Cartwright's case, 114 Mass. 238, Chief Justice Gray says: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land." [16]

In a court of equity, a defendant is bound to obey an order for an injunction, as soon as he has knowlege of it. It is not even necessary that the injunction is served on him, or even issued; hence he has no right to proceed as if it had not been served on him. Any action he may take afterwards, he does at his peril.[17]

The power to punish for contempt exists in the British parliament,—in the Supreme Legislature of the Unites States, as well as in the several legislatures of the States, but the authority to punish for contempt does not exist in the common council of a city. If such authority is assumed, it will be unconstitutional and void.[18]

A witness summond before a committee of the legislature, cannot be deprived of his constitutional privilege of exemption from being obliged to furnish evidence, which might criminate himself, since it lays him liable to a to a criminal prosecution.[19]

The constitution recognizes justices of the peace, as exercising a part of the judicial power, and for same purposes are courts of record, having authority to punish for contempts, as far as it is necessary for the orderly conduct of their business, and the procuring of witnesses to testify.[20]

A petition for an attachment for contempt against those who were in possession of premises anterior to the commencement of an ejectment, cannot be dispossessed upon a judgment, and writ of possession, to which they are not a party.[21]

A witness duly summoned to testify before a grand jury, and appearing before it, but refusing to be sworn, and conducting in a disrespectful manner; the grand jury may require the officer, in attendance, to take the witness before the court in order to obtain its aid and direction in the matter.[22]

This power to punish for contempt is incidental to a proceeding , anterior to the contempt, hence it is not an original action, and the authority to punish for it, ceases when the original action terminates.[23]

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[14] 3 Wilson, 188; 14 East. R. I. 2; Bay R. 182; 6 Wheaton, 204; 7 Wheaton R. 38; Chancellor Kent in 3 Com. 27; 1 Breeze R. 266; 9 Johnson, 395; 6 John. 337.

[15] Elisha A. Clarke's case, 12 Cushing, 320.

[16] 4 Black. Com. 284-288; The King v. Almon, Wilmot, 243, 254; Clarke's Praxis., title 62; Mass. Colonial Laws (ed. 1672), 56; Ancient Charter, 90; Thwing v. Dennie, Quincy, 388; 6 Dane's Ab. 528; United States v. Hudson, 7 Cranch. 32, 34.

[17] Skip v. Harwood, 3 Atk. 564; Vansandan v. Rose, 2 Jac. & Wolk. 264; Howe v. Willard, 40 Vt. 654; Huli v. Thomas, 3 Edw. Ch. 236; Lewes v. Morgan, 5 Price, 518; People v. Sturtevant, 5 Seld. 263; Powell v. Follet, Dick. 116; Hern v. Tennant, 14 Ves. 136: James v. Downes, 18 Ves. 522; Buffum's Case, 13 N. H. 14; Hawley v. Bennett, 4 Paige, 163; 2 Joyce on Injunctions, 1325; 3 Atk. 567; Rattray v. Bishop, 3 Mass. 220; McNeil v. Garratt, Craig & Phil. 98.

[18] Bacon's Abri. Courts E; *In re* Fernandes, 6 H. & N. 717, and 10 C. B. (N. S.), 3; *In re* Chiles, 22 Wallace, 157; 114 Mass. 230; Crosby's Case, 3 Wilson, 188; s. c. 2 Will. Black, 754; Burdett v. Abbott, 14 East. 1, and 5 Dow. 165; Burnham v. Morrissey, 14 Gray, 226; State v. Matthews, 37 N. H. 450; Falvey's Case, 7 Wis. 630; Grant on Corporations, 84-86; Baron Parke, in 4 Moore P. C. 89; Barter v. Commonwealth, 3 Pa. 253; Anderson v. Dunn, 6 Wheaton, 204, 233, 234.

[19] Henry Emery's Case, 107 Mass. 172; Cooley's Constitutional Limitations, 88, 89; Thrope v. Rutland & Burlington Railroad Co., 27 Vt. 140, 142, Cush. Parliamentary Law, §§ 983, 1001; People v. Kelley, 24 N. Y. 74; People v. Mather, 4 Wendell, 229.

[20] Const. Mass. Ch. 3, Art. 3; Thayer v. Commonwealth, 12 Met. 9; Clarke's Case, 12 Cush. 320; Piper v. Pearson, 2 Gray, 120; State v. Copp, 15 N. H. 212; *In re* Cooper, 32 Vt. 253.

[21] 1 Caines R. 500; 5 Littell, 305; 1 A. K. Marsh, 333; 2 Ibid, 40; 2 Tidd's Practice, 1033; Johnson v. Fullerton, 44 Pa. R. 466.

[22] Rex v. Hunter, 3 Car. & P. 591; Ward v. The State, 2 Mo. 120; Heard v. Pierce, 8 Cush. 338; Witherspoon v. Dunlap, 1 McCord, 547; Field v. The People, 2 Scammon, 79; Follamb's Case, 5 Co. 1156; Miller v. Knox, 4 Bingham, N. R. 574, 583; 18 Johnson, 407, 418; Dwarris on Statutes, (2nd ed.), 671.

[23] Clarke's Case, 12 Cush. 320.

ACTION AGAINST RAILROAD COMPANY BY FEMALE PASSENGER, ON ACCOUNT OF INSULTING CONDUCT OF STRANGERS AT STATION.

BATTON & WIFE v. SOUTH & NORTH ALA. RAILROAD CO.

Supreme Court of Alabama.

Duty of Railroad Company to Protect passengers against violence and misconduct.—Although it is the duty of a railroad company, as a common carrier, to protect its passengers, and especially female passengers, against violence or disorderly conduct on the part of its own agents and servants, other passengers, and strangers, when such violence or misconduct may be reasonably anticipated and prevented; yet it is not liable to an action for damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by two or three intruders, who came into the waiting-room at the station while plaintiff was awaiting the arrival of the train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage.

Appeal from the Circuit Court of Shelby.

Tried before the Hon. S. H. Sprott.

The opinion in this case states all the material facts. On all the evidence adduced, which is set out in the bill of exceptions, the court gave a general charge in favor of the defendants, to which the plaintiffs excepted, and which they now assign as error.

Watts & Son, Oliver & Oliver, for appellant; *Thos. G. Jones, contra.*

SOMERVILLE, J., delivered the opinion of the court:

The action is one of novel impression, for which we nowhere find a precedent. It is a suit for damages against a common carrier—a railroad company—instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station, belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who, having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham. Wabash R. R. Co. v. Rector, 9 Amer. & Eng. R. R. Cas. 264; Gordon v. Grand St. R. R. Co., 40 Barb. (N. Y.) 546.

The nuisance complained of appears to have been an extraordinary occurrence, and one of which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In Britton v. Atlanta & Charlotte Railway Co., 88 N. C. 536 (18 Amer. & Eng. R. R. Cas. 391; s. c., 43 Amer. Rep. 748), the rule is stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purposes of this decision, as it seems to be supported by authority. New Orleans Railroad Co. v. Burke, 53 Miss. 200; Pittsburg R. R. Co. v. Hinds, 53 Pa. St. 512; Pittsburg R. R. Co. v. Pillow, 76 Pa. St. 510; Goddard v. Grand Trunk R. R. Co. (57 Me. 202), 2 Amer. Rep. 39; Cooley on Torts, 644-645; Nieto v. Clark, 1 Clifford, 145; Putnam v, Broadway R. R. Co., 55 N. Y. 108.

In the case of the Pittsburg Railway Co. v. Hinds, 53 Pa. 512, *supra*, the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who, defying the power of the conductor, entered the

cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies; the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said Woodward, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It cannot be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also, in a measure, to what has been termed "subsidiary arrangements." 2 Rorer on Railroads, 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide reasonable accommodations for the passengers who are invited and expected to travel their roads. Knight v. Portland R. R. Co., 56 Me. 234; McDonald v. Chicago R. R. Co., 26 Iowa, 124. The measure of duty is admitted by all the authorities, however, not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature. Baltimore & Ohio R. R. Co. v. Schwindling, 8 Amer. & Eng. R. R. Cas. p. 552, note.

We do not think that there is any duty to police station houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability or a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. 2 Kent. Com. 593. There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe-carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It was a risk which was incidental to one's presence anywhere when traveling without a protector, and it was the plaintiff's risk, not the defendant's.

We discover no error in the rulings of the court, and the judgment must be affirmed.

NOTE.—I shall not attempt a statement of the law of negligence by carriers of passengers, and their servants, resulting in bodily harm, but shall confine myself to personal injuries relating to rights not of a physical character. Carriers of passengers are those who transport persons employing them from place to place for hire.[1] Neither entry on cars nor payment of fare is necessary to constitute the relation of passenger. Being in waiting room, waiting for the train as a would-be passenger is sufficient.[2] The duties of such carriers extend to their platforms and approaches and buildings set apart for the use of passengers.[3] Their responsibility does not begin until relations to them as passengers or personal connection on business are established, and it ends when these relations cease.[4] They are not liable for injuries of any character to persons not passengers nor connected with them;[5] but their duties extend to escorts of sick or dependent passengers.[6] It may be stated, as the general rule, that passengers contract for good treatment, and against personal rudeness and every waiter's interference.[7] The duties of railroads are on the same footing with steamboats in their duties towards passengers,[8] and the duties of the latter have been likened to those of innkeepers toward their guests. The innkeeper is bound[9] so to regulate his house, as well with regard to the peace and comfort of his guests, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct, and to exclude disorderly persons.[10]

The duties of carriers of passengers include everything calculated to render the transportation most comfortable and least annoying to passengers.[11] They must not only protect passengers against the violence and insults of servants, but also of strangers and co-passengers.[12] So where one was drenched with water by a servant.[13] So where one was expelled from a waiting room for spitting on the floor.[14] So where a harlot was excluded from train, she not violating any propriety.[15] And a colored person.[16] So where a conductor of a freight train kissed a female passenger against her will, the court held the company liable to compensatory damages, which included mental suffering and upheld a verdict for $1,000.[17] "To such the protection which is the natural instinct of manhood towards their sex, is specially due by common carriers.[18]" As to such, their duties cover freedom from

1 See Wharton on Negligence, § 545, 625; Field's Lawyer's Briefs, vol. 2, p. 1; Cooley on Torts, p. 638.

2 Gordon v. Grand St., etc. R. Co., 40 Barb. 546. See Jeffersonville, etc. R. Co. v. Riley, 39 Ind. 568.

3 Field's Lawyer's Briefs, vol. 2, p. 71; Wait's Actions & Defenses, vol. 2, p. 71, 72; Wharton's Negligence, § 653, *et seq.*; Pierce on Railroads, p. 276.

4 Cooley on Tort-, p. 644; Wharton's Negligence, § 642. See Jeffersonville, etc. R. Co. v. Parmalee, 51 Ind. 42.

5 Porter v. C. R. I. & P. R. Co., 41 Iowa, 358. See Toledo, etc. R. Co. v. Williams, 77 Ill. 354. See Malmston v. Marquette, etc. R. Co., 8 Am. & Eng. R. Decisions, 291 (Mich.).

6 Wharton Negligence, § 642.

7 Pendleton v. Kingsley, cited in Bryant v. Rice, 106 Mass. 189, which see. See, also, generally, Lay v. Aubury, 28 Ill. 412; Flint v. Norwich R. Co., 34 Conn. 554; Smith v. Wilson, 31 How. (N. Y.) 272; Coger v. N. W. Un. Packet Co., 37 Iowa, 145; West Chester, etc. R. Co. v. Miles, 55 Pa. St. 209; Shirley v. Billings, 8 Bush. 147. See McKinley v. C. & N. W. R. Co., 44 Iowa, 314; New Orleans, etc. R. Co. v. Burke, 53 Miss. 200.

8 Commonwealth v. Power, 7 Metc. 596; Chicago & Eastern R. R. Co. v. Flexman, 8 Am. & Eng. R. Dec. p. 357.

9 Jencks v. Coleman, 2 Sumner, 221.

10 Markham v. Brown, 8 N. H. 523; Commonwealth v. Power, *supra*; Barr v. C. & N. W. R. Co., 36 Wis. 459.

11 Day v. Owen, 5 Mich. 520.

12 Goddard v. Grand Tr. Ry. Co., 57 Me. 202.

13 T. H. & I. R. R. Co. v. Jackson, 6 Am. & Eng. R. Dec. 178.

14 People v. McKay, 8 Am. & Eng. R. Dec. 205.

15 Brown v. Memphis & C. R. Co., 1 Am. & Eng. R. Dec. 247.

16 Gray v. Cincinnati, S. R. Co., 6 Am. & Eng. R. Dec. 588; Pleasants v. N. B. R. Co., 34 Cal. 586.

17 Craker v. C. & N. U. R. Co., 36 Wis. 657.

18 Craker v. C. & N. W. R. Co., *supra*: Bass v. R. Co., 36 Wis. 460.

obscene conduct, lascivious behavior, and every immodest and libidenous approach,[19] and from others not servants, as passengers and strangers.[20] But railroad companies are not responsible for the acts of mobs,[21] and a case in New York held that they are not liable for insulting language of their servants.[22]

But, as illustrating the broad scope of the rule, it is the implied contract of carriers of passengers, that the latter shall be treated respectfully and have immunity from any wanton interference with that right.[23]

And Ryan, C. J., in Croker v. Ry. Co.,[24] lays down the rule that the master is liable for the willful or wanton acts of his servants, said: "There can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegates it to an agent, and the agent fails to perform it, it is immaterial whether the failure be accidental or willful. If one owe bread to another, and appoints an agent to furnish it, and the agent, of malice, furnishes a stone, instead, the principal is responsible for the stone and its consequences."

And the court in Goddard v. Grand Trunk Ry.,[25] said: "The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. It is not sufficient that they are capable of doing it well, if, in fact, they choose to do it ill; that they can be polite as Chesterfield, if, in their intercourse with the passengers, they choose to be brutal, coarse and profane."

In Chicago & East. R. Co. v. Flexman,[26] the court show a further reason for the rule. If a conductor or brakeman in the employ of a railroad company should willfully or maliciously assault a stranger, the master would not be liable for the act of the servant, but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented."

On the other hand, when the act is unnecessary to the performance of the master's service, and not intended for that, but causes of the servants own malice, etc., some cases hold there is no liability. It will not do, they say, to aver that the master has given the servant power, for that rule would make the shopman, mechanic, and all employers liable for the malicious acts of their servants.[27] But the contrary rule is held by the majority of the books.[28]

But the ground of Batton and Wife, above, is not disturbed by these decisions. No case holds railroad companies responsible for perfect management of their property as respects the rights and feelings of the public. The great rule of negligence that no person is liable for occurrences which a reasonably prudent and careful man may not foresee, obtains. The conductor, or person in charge of trains, and, of course, of stations, etc., must know the act complained of, or have reasonable opportunity of knowing it, and have the power and opportunity of preventing it, by his own efforts, or of others present.[29] It may be added that companies are bound to exclude disorderly persons.[30] A company was held not liable for the nuisance of a culvert used by its servants as a privy.[31]

Oshkosh, Wis. F. C. HADDOCK.

19 Nieto v. Clark, 1 Clifford, 145; Chamberlain v. Chandler, 3 Mason, 242.

20 Stephen v. Smith, 29 Vt. 160; R. Co. v. Hinds, 53 Pa. St. 512.

21 Railway v. Hinds, 53 Pa. St. 512.

22 Parker v. Erie Ry. Co., 5 Hun. 57.

23 Weed v. Panama R. Co., 17 N. Y. 362; Ry. Co. v. Anthony, 43 Ind. 183; Bayley v. Railroad Co., L. R. 7 C. P. 415; Coleman v. R. R. Co., Id. 153; Brance v. Ry. Co., 8 Barb. 368; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; Seymour v. Greenwood, 7 H. & N. 354; Railroad v. Blacher, 27 Md. 277; Holmes v. Wakefield, 12 Allen, 580; Railroad Co. v. Finney, 10 Wis. 388; Landreaux v. Bel, 5 La. (O. S.) 434.

24 *Supra.*

25 57 Me., p. 214.

26 *Supra.*

27 Evansville, etc. Co. v. Baum, 26 Ind. 73. See, also, Gregory v. Piper, 9 B. & C. 591; Croft v. Alison, 4 B. & Ald. 590. See Hays v. H. G. N. R. R. Co., 16 Tex. 273.

28 Pa. R. v. Vandwer, 42 Pa. St. 365; Seymour v. Greenwood, 30 L. J. (Exch.) 189; Atlantic & G. U. R. Co. v. Dunn, 19 Ohio St. 162.

29 New Orleans, etc. R. Co. v. Burke, 53 Miss. 24.

30 Putnam v. Br. & Ger. Av. R. Co., 55 N. Y. 108. See Pittsburg v. Pillow, 76 Pa. St. 510; Railway Co. v. Hinds, *supra;* New Orleans, etc. R. v. Burke, 53 Miss. 209.

31 Hopkins v. Western Pac. R. Co., 50 Cal. 100.

LIFE INSURANCE—APPLICATION—AGENT—WHEN AGENT OF COMPANY, AND WHEN OF INSURED—ANSWERS — WARRANTIES — FRAUD—RETURN OF PREMIUM

CONNECTICUT MUT. LIFE INS. CO. V. PYLE.

Supreme Court, of Ohio. Fild January 26, 1886.

Insurance Policy — Agent—Application—When the agent of an insurance company fills up the application for insurance, in so doing he is the agent of the company and not of the insured.

Application for Insurance—Answers—Warranties. When the answers to an application for insurance are made by the policy a part thereof, and are waranted to be true, if any of them material to the risk are untrue, the policy is void *ab initio.*

Policy of Insurance—Avoided by Misrepresentation not Fraudulent—Return of Premium.—When a policy of insurance is avoided by misrepresentations not fraudulent, the premium must be returned.

Error to district court, Ross County.

August 1, 1878, Jeremiah Pyle brought suit against the Connecticut Mutual Life Insurance Company to recover back the premium paid for a policy that the company had cancelled. Pyle in his petition says, that on August 21, 1872, the defendant, by its agent, on John A. Nipgen, duly authorized to take applications for life insurance in the company of defendant, and to receive the cash premium thereon, applied to plaintiff at his home, "Pyle Farm," in Ross County, and requested him to take a policy of insurance in defendant's company upon the life of plaintiff. At first plaintiff refused to do so on account of having no money, when Nipgen offered to advance to or loan plaintiff the money to make the first payment on the policy, to which proposition he acceded, and then told Nipgen that he, plaintiff, had failed in getting a policy of insurance in June, 1871, in the Charter Oak Insurance Company, of which Mr.

Schutte was agent, on account of something being the matter with his pulse. Nipgen then asked plaintiff if the application had been sent to the company; plaintiff replied that it had not as he knew of; to which Nipgen responded that "if it had not gone any further than that, it did not make any difference;" and thereupon plaintiff agreed with defendant, acting by its agent, to make application for a policy of insurance upon his life in defendant's company for the sum of $10,000, the same to be paid at the office of defendant in Hartford, Connecticut, to Ede Pyle, wife of plaintiff, if she survived him, if not, to the the children of plaintiff, or their legal representatives, etc. The said Nipgen, having a blank application, then commenced asking plaintiff the questions required to be asked of an applicant by the "statement of particulars respecting the person whose life is proposed for insurance, and which statement forms a part of the contract of insurance," and which are the same questions attached to the policy afterwards issued by defendant, and plaintiff answered them until Nipgen came to this question, "has any company ever declined to grant insurance on your life?" when he, Nipgen, said he would just answer that question "no." Plaintiff told him "it was something he knew nothing about," that he could do just as he pleased about that. Nipgen thereupon put down in answer to said question, "no." Plaintiff and Nipgen, on the same day, went to Hallsville, to Dr. Gildersleeve, who, owing to the absence of the regular examining physician of the defendant, examined plaintiff, and thereupon Nipgen told Gildersleeve to answer all the medical questions "no,"—meaning the "questions to be answered by the Medical Examiner of the Connecticut Mutual Life Insurance Company," and they were so answered. Plaintiff then signed said application for his wife and himself, as required, and executed his note, payable to the order of Nipgen at the First National Bank of Chillicothe, Ohio, four months and ten days after date, for the sum of $219.20, with interest, being the amount of "cash premium" required to be paid, and which note having been indorsed by Nipgen, plaintiff afterwards, at maturity paid. The application was sent to the company, and a policy, No. 119,633, of date August 31, 1872, in said amount, on plaintiff's life, issued, and shortly afterwards was delivered to plaintiff. Upon reading the policy about a month afterwards plaintiff found it contained, among others, the following conditions and agreement:

"This policy is issued and accepted upon the following express conditions and agreements: (1) That the answers, statements, representations, and declarations, contained in or indorsed upon this application for this insurance (which application is hereby referred to, and made part of this contract) are warranted by the insured to be true in all respects; and that, if this policy has been obtained by or through fraud, misrepresentation, or concealment, that this policy shall be absolutely null and void. * * * (4) That in every case in which the policy shall cease and determine, or shall become null and void, all premiums paid in respect to the same shall be forfeited to the company."

At the foot of the application, and a part thereof, is the following:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company."

Plaintiff then called on Nipgen, and referring him to the terms of the policy told him that he thought it was of no account, owing to the answer "no" to the question whether any company had ever declined to grant insurance on his life. He said that plaintiff should bring the policy in and get it corrected, and that he would write to the company about it. Plaintiff took the policy to Nipgen, and Nipgen wrote to the company stating that said question should have been answered "yes" instead of "no," and stated how far the Charter Oak matter had gone in plaintiff's case. Plaintiff signed the letter, and Nipgen mailed it. About three or four weeks afterwards plaintiff inquired of Nipgen about the matter, and was told that the company had said that plaintiff had better go before Dr, Scearce and be re-examined. About a week after plaintiff did so, and was asked about his heart, and answered that it bothered him sometimes; that after working hard he got weak and nervous sometimes; that he took whisky and ginger for it. Plaintiff left, and they made out the application. Plaintiff called on Nipgen repeatedly about the matter, and he claimed that he had not yet heard from the company; then, about two months after, that the application (meaning the new or corrected one) had ben mislaid in the Cincinnati office of defendent. Then Nipgen and Scearce made out another application and sent it on. This was the third application, and was made without the knowledge of plaintiff. When plaintiff again called on Nipgen he was informed by him that the company had declined his application.

There were attempts to get a new or corrected policy in place of the original one. On August 1, 1873, or thereabouts, plaintiff informed Nipgen that he was ready to make payment whenever he, Nipgen, would get it fixed. The defendant, upon receiving the third application, and without the knowledge or consent of plaintiff, cancelled and annulled said policy of August 31, 1872. This was, as plaintintiff thinks, at or about the expiration of one year from the time it was issued. Upon being informed of said cancellation of said policy some time in September, 1873, the precise time not now remembered, plaintiff demanded from said agent

and said company the repayment of his money so paid as premium, which was refused. Wherefore plaintiff prays judgment against said defendant for said sum of $219.20, with interest thereon from August 31, 1872; or, if the court shall be of opinion that an action to recover back the money paid, is not the proper action, then that the plaintiff may recover from the defendant the sum of $500, his damages herein sustained; or that defendant, upon being paid the back premiums on said policy, may be ordered to rescind the cancellation and annulling of said policy, and to correct the same as to said answer mentioned, according to the fact, and for other proper relief.

A demurrer to this petition was overruled, and the insurance company answered, denying that plaintiff "told said Nipgen that he, plaintiff, had failed in getting a policy of insurance in June, 1871, in the Charter Oak Insurance Company, of which Mr. Schutte was agent, on account of something being the matter with his pulse;" that "Nipgen then asked plaintiff if the application had been sent to the company;" that "plaintiff replied that it had not as he knew of, to which Nipgen responded that if it had not gone further than that it did not make any difference," and says that no such conversation took place between the plaintiff and said Nipgen; also the company denied other specific allegations, but it did not deny that its agent, Nipgen, wrote the application. To this answer plaintiff replied, denying some specific allegations of the answer.

On the trial, by request of defendant, the court found as its conclusions of fact that in addition to the facts admitted by the pleadings, several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered, which answers were by the terms of the policy made warranties, but the court further finds that all of said questions so erroneously answered were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant. The court further finds that the untruth of several of said answers was upon questions material to the risk, and that by the terms of said policy and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy; and that by its terms the breach of said warranties was to make said policy null and void. The court finds, as conclusions of law, that the plaintiff is not entitled to have the cancellation of said policy of insurance set aside, nor to have the same reformed in any particular, and that the same is wholly void, and of no effect whatever, and was so from the moment it was issued. The court further finds as a conclusion of law that the plaintiff is entitled to recover of the defendant the sum of $219.20, the premium paid, with interest from the twenty-first day of August, 1872, to which the defendant, by counsel, excepted,

A motion for a new trial was overruled, and the ruling excepted to, and judgment was entered for Pyle. The district court affirmed this judgment, and plaintiff in error now seeks to reverse these judgments.

Lawrence T. Neal and *Vanmeter & Throckmorton*, for plaintiff in error; *Clark & McDougal*, for defendant in error.

FOLLETT, J. delivered the opinion of the court.

In filling up the application for this policy Nipgen was the agent of the insurance company, and was not the agent of Pyle. Insurance Co. v. Williams, 39 Ohio St. 584. And, though the application was thus made, the policy was cancelled for its untrue statements innocently made on the part of Pyle. The application and the policy together form the contract. The terms of the contract are plain, and free from doubt or ambiguity. It is agreed in the application "that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations, or concealment of facts, then any policy granted upon this application shall be null and void." And the policy provides that "this policy is issued and accepted upon the following express conditions and agreements: (1) That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, that this policy shall be absolutely null and void."

1. Did the policy ever attach, or was it ever valid? The court finds, as conclusions of fact, that "several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered;" and the court further finds "that the untruth of several of said answers was upon questions material to the risk, and that, by the terms of said policy, and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that, by its terms, the breach of said warranties was to make said policy null and void." And the court finds, as a conclusion of law, that the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

But the plaintiff in error insists that the policy took effect and was in force until it was cancelled. To sustain such a claim would ignore the expressed terms of both the application and the policy, as well as the cause of the cancellation of the policy These terms the plaintiff in error has never waived, but it has insisted upon them, and acted upon the

strict letter of the agreement, and has cancelled the policy.

This is not a new question in the courts. In the case of Clark v. Manufacturers' Ins. Co., 2 Wood. & M. 472, the court held:

"A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not. Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud."

In Friesmuth v. Agawam Mut. Fire Ins. Co., 10 Cush. 587, "the application contained an untrue representation that the property was unincumbered," and the court held "that the policy was wholly void." In Foot v. Ætna Life Ins. Co., 61 N. Y. 571, the court held:

"If a policy of insurance declare that the statements made in the application shall be part and parcel of the policy, such statements become warranties, and must be true, whether material or not. A contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud or misrepresentation." Co-operative Life Ass'n of Miss. v. Leflore, 53 Miss. 1.

On a similar contract the Supreme Court of the United States, in Jeffries v. Life Ins. Co., 22 Wall. 47, held: "Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given to the risk." And in the opinion Mr. Justice Hunt says: "Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express conditition to the existence of a liability on the part of the company." And this is approved in the case of Aetna Life Ins. Co. v. France, 91 U. S. 510, where the court also held, "that the company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should avoid the policy, removes the question of their materiality from the consideration of the court or jury."

This court in Union Mutual Life Ins. Co. v. McMillen, 24 Ohio St. 67, held: "Where a life policy is made and accepted, upon the expressed condition that if the annual premium is not fully paid within the time specified, the policy 'shall be null and void, and wholly forfeited,' the failure to pay the premium avoids the policy;" and that was where the policy had attached. But in such a case in Insurance Co. v. Bernard, 33 Ohio St. 459, the court held, where "the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured."

There are mistakes in policies that may be disregarded or corrected, and the policy enforced. See Harris v. Columbiana Co. Mut. Ins. Co., 18 Ohio, 116, and Insurance Co. v. Williams, *supra*. But in this case the court did not err in holding the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

2. Should the premium be returned? The court finds as a conclusion of law that Pyle is entitled to recover of the insurance company the premium paid, with proper interest. The court thus held not only because the policy was void *ab initio*, but because it also found "that all of said questions so erroneously answered were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant." There was no actual fraud, at least on the part of Pyle. On this policy no risk ever attached. In 1777, in the case of Tyrie v. Fletcher, Cowp. 666, 668, Lord Mansfield stated the general rule to be, "that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it." In 1800, in the case of Delavigne v. United Ins. Co., 1 Johns. Cas. 310, the court held: "Where a policy becomes void, by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud."

"Where a policy is avoided by concealment, or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer." Anderson v. Thornton, 8 Exch. 425. And such is now the general rule. See 3 Kent, 341, and May, Ins., § 4. The rule is different where the risk has attached, or there is actual fraud. Yet it is urged here that "we must leave the premium paid by the insured to be disposed of according to the terms of his contract with the insurer." No such terms exist. There is no contract between Pyle as the "insured," and the company as the "insurer." Under this policy Pyle never was insured, and the company never was an insurer of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy. From all that appears Pyle was not in fault, and the agent should not have obtained the premium, and the

insurance company should not retain Pyle's money.

Of course we have not considered how far the provisions of such a policy may be waived by the acts of the parties, nor to what extent such parties may be bound by their subsequent acts. and in connection with such provisions and what was done in procuring such application and policy. The court did not err, and the judgment is affirmed.

NOTE.—Insurance companies have tried to protect themselves from the frauds of their agents in procuring insurance by provisions in their policies, limiting the power of their agents to the receipt of the papers, the delivery of the policy and the receipt of the premium, and declaring that, if any one beside the assured assisted in preparing the application, that he should be regarded as the agent of the assured and not of the company. They relied upon the rule of law, that the policy expressed the contract, and could not be valid by parol evidence. So long as the insured seeks the company and makes his own application, this rule seems reasonable, and the courts were inclined to adopt it. But when the companies flooded the country with agents, and exhorted them to procure all the insurance possible, allowing them liberal commissions on their business and furnishing them with blank applications for the insured; and it was notorious that the agents were soliciting everyone to insure, often themselves preparing the application; it was perceived that such a rule would enable unscrupulous agents to commit great frauds on the ignorant or unwary. So the doctrine of equitable estoppel, or estoppel *in pais*, was resorted to. The contract was not set aside, but the company was held estopped from availing itself of its provisions contrary to the acts and representations of its agent, its *alter ego*, with whom alone the insured generally came in contact, and upon whose acts and representations the insured had relied as voicing the views of the company and its interpretation of the meaning of the questions propounded to him in the application.

So it is held, that, when the agent prepares the application for insurance, he is the agent of the company and not of the assured, the policy to the contrary notwithstanding.[1] Agents authorized to take applications for insurance are acting within the scope of their authority in everything they do, which may be necessary to complete such application. In this case the assured submitted his title to the agent, who stated it incorrectly in the application. The company was estopped from defeating a recovery on the policy on that ground.[2] Where the agent wrote the application for a joint policy in favor of the owner of some real property and of the owner of some personal property, which they used together under a contract, they having stated to the agent their separate ownership, parol evidence was admissible to show that they and the agent agreed to consider the property as joint, and the company was held to be liable.[3] Where plaintiff had an equitable title to property, which was explained to the agent, who wrote the application and stated therein it was plaintiffs' property, parol evidence was admitted to prove an agreement between the parties to treat the property as plaintiffs'.[4] Where party stated the facts correctly and signed a blank application, which the agent subsequently filled out, it was held, that an agent to take applications is acting in the scope of his authority in everything he may do which may be necessary to complete the application, and that the company was estopped to show the facts to be different from the statements in the application.[5] Where the agent wrote the application, and inserted answers different from those made by the applicants, the company was bound by them and could not use those answers to defeat the policy.[6] The principal is liable for the wrongful acts of his agent; he cannot take the benefit of such acts and avoid their burdens.[7] Where the agent of the company deliberately inserted false answers, when the applicant, who could not read, had given correct ones, the company was estopped to claim breach of warranty. The provision in the policy, that every party assisting in obtaining the policy, is the agent of the assured, is a legal contradiction and is invalid.[8] Public policy and the protection of the community require local agents, and their sub-agents, in rendering aid in issuing policies to be considered as the agents of the companies and not of the assured. In this case the agent stated the title according to his construction of it, and the company was bound by it.[9]

The agent substituted a different application from that made by the assured, and the company was estopped from claiming a breach of warranty.[10] The courts rightfully hold, that, where the question is which of two innocent parties shall suffer, the company, which appointed the wrong-doer its agent and put him in the position where he could perpetrate the wrong, shall be the sufferer. An agent induced a beneficiary to believe that the company did not recognize the validity of the policy and would not pay the loss, and induced her to place her claims in the hands of an attorney, whom he recommended, who agreed to pay her a certain sum, about a fourth of the policy, if he collected so much. The agent had reported the policy as valid, and the company had never questioned its validity, and in due time forwarded the money to him. The agent gave the money to the attorney, who paid the beneficiary the agreed amount, taking for the company her receipt in full, which the agent informed her the company demanded, no matter what it paid. It was held, that in the whole matter the agent was in the discharge of his duties, and the company was responsible for his misrepresentations and fraudulent actions, and must make good the full amount of the policy to the beneficiary.[11]

Policies are construed strictly against the companies, and statements of the insured are construed as representations, unless the contract clearly makes them warranties. A warranty must be strictly true, no matter how unimportant it may be, or it will avoid the policy, since the policy so provides. The statements in the application may be made warranties by the terms of the policy by referring to them and adopting them as a part of the policy. A representation, if untrue, will not avoid the policy, if not wilful or if not material. If answers to specific questions are misrep-

[1] Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108; Insur. Co. v. Wilkinson, 13 Wall. 222.
[2] Combs v. Hannibal S. & I. Co., 43 Mo 148.
[3] Peck v. New London Ins. Co., 22 Conn. 575.
[4] Hough v. City F. Ins. Co., 29 Conn. 10.
[5] Rowley v. Empire Ins. Co., 36 N. Y. 550.
[6] Ins. Co. v. Mahone, 21 Wall. 152; New Jersey M. L. Ins. Co. v. Baker, 94 U. S. 610.
[7] Farmers' Ins. Co. v. Williams, 39 Ohio St. 584.
[8] Sullivan v. Phœnix Ins. Co., (opinion of Kans. Sup. Ct., Oct. 9, 1885) 8 Pac. Rep. 112.
[9] Woodbury S. Bk. v. Charter Oak Ins. Co., 31 Conn. 517.
[10] Massachusetts L. Ins. Co. v. Esheiman, 30 Ohio St. 647.
[11] Life Ins Co. v. McGowan, 18 Kas. 300.
[12] Miller v. Mut. B. L. Ins. Co., 31 Iowa, 216; Schwarzbach v. Ohio Valley P. Union (abstract of opinion of W. Va. Ct. App. April 1, 1885), 14 Ins. Law J. 518.

resentations, they avoid the policy, whether the court or jury regard them as material or not, because by asking them the company has made them material; but to avoid the policy, they must be fraudulently false, that is, he must know his answers to be false, or states certain things to be facts when he is ignorant thereof.[12]

A contract of insurance is a contract of indemnity, and where there has been no risk, there has been no consideration. In such cases courts have always allowed the premium paid to be recovered back. If the contract was void *ab initio*, there has been no risk. Of course, there must be no fraud or illegality in the contract, for in such cases the courts never lend their assistance.[13] Since the suit is not on the policy, which was void *ab initio*, a limitation in the policy, that suit must be brought within a specified time, cannot affect the suit.[14]

In the principal case the court alludes to the doctrine of waiver, which often has an important bearing in suits on insurance policies. The courts do not view with favor any action, which leads the assured to rely upon the continuance of their policies, and then allows the companies at the time of loss to repudiate the contracts. Good faith requires them when they have ground for forfeiture to act promptly, or they will be held to have waived the breach; and knowledge by their agents is their own knowledge. A company cannot occupy inconsistent positions. Any decisive act of the insurer done with knowledge of his rights and of the facts, determines his election and works an estoppel.[15] A forfeiture is not favored by law. It must be made unconditionally, and in plain, positive, unmistakeable terms.[16] Where the insurer knew of subsequent occurrences upon which he could forfeit the policy, yet afterwards assessed and collected a premium, he was estopped to claim a forfeiture.[17] So where an agent was similarly notified, and the company called on the insured to prepare proofs of loss, which he did at some expense and trouble.[18] So where assured took additional insurance, which vitiated the policy, and after the loss the company was notified of that fact, but, instead of refusing to pay on that ground, called on plaintiff to furnish plans and specifications of the building destroyed, which he did. Webster v. Phœnix Insurance Company, *supra*. So, if at the issuance of the policy it knew of the existence of facts material to the risk, even though the assured said they did not exist.[19] So, if at the time of issuing the policy the secretary of the company had in his hands evidence of misstatement of age, which it was his duty to examine.[20] So, where policy was forfeitable, because premises became vacant, of which the agent was notified, who said it was all right. So, where proofs of loss were to be made as soon as possible, which were prepared within four months after the loss with the assistance of the agent, and were sent to the company and retained by it without objection.[21] So, taking an additional risk on the same policy, knowing at the time of a breach of condition, for which the policy might be forfeited.[22] So, knowledge at the time of issuing policy, that the insured intended to go South, is a waiver of a limitation against his so doing.[23] So, renewal of a policy forfeited for non-payment of premiums without inquiry as to health, where policy provided that it might be renewed on proof of good health.[24] The question of waiver is very fully examined in Viele v. Germania Ins. Co.,[25] and in the note appended thereto. It was there held, that no new consideration is required for a waiver; that it is an estoppel, and may be made by parol. In that case the risk was increased, and the agent of the company, who had the usual powers given to local agents, knew of the existence, and by his acts and declarations admitted that the policy was still in force. After a loss the company was held to be estopped from claiming a forfeiture. Where the policy expressly stated the agent could not waive certain requirements, a waiver by the agent was held not binding on the insurer without proof of a subsequent authorization, or a ratification of the act.[26]

The drift of the decisions now is to the effect, that the insurer can waive by parol or by conduct any provision of the policy of insurance. This waiver can also be made by any agent, if his apparent authority makes him the representative of the insurer in such matters, unless the limitation on his agency is brought home to the insured.

S. S. MERRILL.

[12] Feise v. Parkinson, 4 Taunt. 640; Routh v. Thompson, 11 East, 428; Penson v. Lee, 2 Bos. & P. 330; Hentig v. Staniforth, 5 Maule & S. 122; Colby v. Hunter, 3 Car. & P. 7; Friesmuth v. Agawam Ins. Co., 10 Cush. (Mass.) 587; Hoyt v. Gilman, 8 Mass. 336; Russell v. DeGrand, 15 Mass. 35; Elbers v. U. S. Ins. Co., 16 Johns. 128; Forbes v. Church, 3 John. Cas. 159; Clark v. Manuf. Ins. Co., 2 Wood. & M. 472; Scriba v. Ins. Co. of N. A., 2 Wash. C. C. 107; Waller v. North Ass. Co., 64 Iowa, 101.

[14] Waller v. North Ass. Co., *supra*.

[15] Webster v. Phœnix Ins. Co., 36 Wis. 67.

[16] Joliffe v. Madison M. Ins. Co., 39 Wis. 111.

[17] Viall v. Genesee Ins. Co., 19 Barb. 440; Ostenloh v. New Denmark M. U. Ins. Co., 60 Wis. 126.

[18] Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108.

[19] Schwarzbach v. Ohio Valley P. Union, *supra*.

[20] Morrison v. Wis. O. F. L. Ins. Co., 39 Wis. 162.

[21] Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201.

[22] Rathbone v. City Ins. Co., 31 Conn. 193.

[23] Bevin v. Conn. Life Ins. Co , 23 Conn. 244.

[24] Buckbee v. U. S. Ins. Co., 18 Barb. 541.

[25] 26 Iowa, 9.

[26] Franklin Ins. Co. v. Sefton, 53 Ind. 380; Koelges v. Guard. Ins. Co., 2 Lans. 480; Davis v. Mass. M. L. Ins. Co., 13 Blatchf. 462.

WEEKLY DIGEST OF RECENT CASES.

1. ACCORD AND SATISFACTION—*Decree—Payment, Partly in Money and Partly in Property Taken in Satisfaction—Receipt — Conflict of Evidence—Satisfaction of Decree—Payment and Transfer of Property Given Effect as.*—The facts in this case are set out at length by the court, and show the payment of a sum of money by a debtor against whom a decree had been rendered, and, in addition thereto, the transfer of a cow, which payment and delivery were followed by the giving of a re-

ceipt in full by the creditor. The evidence was conflicting upon the question whether or not the debtor also agreed to pay certain costs and fees in a suit leading to the decree. The trial court found that the payment and delivery of the cow were in themselves, by the agreement, made in full satisfaction of the debt, and this finding is affirmed by the Supreme Court. The principle that the payment of a smaller sum cannot be pleaded as a satisfaction of a larger sum admittedly due, does not apply to the case of a payment of a smaller sum, with the transfer, in addition thereto, of an article of personalty, or other valuable right or property which is not money, in satisfaction of such larger sum. The transfer of an article of personalty or other property is taken to be equivalent to a full satisfaction of the condition. *Neal v. Handley*, S. C. Ill., March 27, 1886, N. E. Repr. 45.

2. ADMINISTRATOR, DE BONIS NON—EXECUTOR—*Official Bond—Action.*—In Maine, the administrator *de bonis non* is officially interested in the executor's bond, to the amount of the unadministered estate; and may maintain an action on such bond without applying to the judge of probate, provided his interest has been specifically ascertained. Otherwise he must have the authority of the judge of probate to bring the action, and he cannot rely therefore upon an authorization granted to another person to bring such an action. The writ, in an action by the administration *de bonis non* against the executor, will be adjudged bad on demurrer if it fails to allege some fact which will authorize the maintenance of such suit. *Waterman v. Dockray*, S. C. Me., Feb. 6, 1886, N. Eng. Rep.

3. AGENCY—*Principal and Agent — Authority to Sell Land—Contract for Payment of Purchase Money—Ratification of Contract — Receipt and Retention of Earnest Money*—Authority to agents, not under seal, to "sell" land, empowers them to make an executory contract to sell, upon the terms prescribed by the principal. A contract made by agents providing for payment of the purchase price on or before three years is unauthorized, they being empowered only to make it payable in three years. A principal is not chargeable with liability, on the ground of having ratified such a contract, in the absence of notice or knowledge on his part of the unauthorized terms of it, and no facts existing to raise an estoppel. The mere receipt and retention, by the agents, of deposit or earnest money paid upon such contract, does not estop the principal to deny the validity of the contract. *Jackson v. Badger*, S. C. Minn., March 1, 1886, N. W. Rep. 908.

4. APPEAL—*Record—Nunc Pro Tunc Order—Evidence —Value of Land—Criterion of Value—Price of Property Whose Value was Made by Improvement in Question.*—The Supreme Court cannot disregard the evidence and rulings of the court on the trial of the issue which are certified by the court as authentic and correctly reported, and which the decree recites to be the basis of its findings, because they were not certified and brought on the record at the same term at which the decree was entered. On the trial of the issue before the jury as to the value of the land taken by the park commissioners far the purposes of the park, the court will not accept the offer of plaintiff, as tending to show the value of his land, of proof of prices that had actually been paid on sales of similar proberty situated so as to adjoin the park, or be in its immediate vicinity, such sales having taken place after the lines of the park boundaries had been definitely ascertained and laid out. *Kerr v. South Park Commrs.*, S. C. U. S., March 29, 1886, S. C. Rep. 801.

5. BAILMENT—*Agent—Conversion.*—The owner of a horse placed him in the hands of a commission merchant for sale. The commission merchant exchanged him for another horse and $25 in money. Held, that his authority as commission merchant ceased and his liability to account to the owner accrued when that exchange was made; that the owner was not liable for losses arising from subsequent exchanges nor for the board of horses after the first exchange. *Wing v. Neal*, S. C. Me. Jan. 20, 1886, N. E. Rep.

6. CONTRACT — *Building Contract — Acceptance—Waiver.*—The conditions of a building contract that payment shall not be made except upon the certificate of the architect that the work has been fully completed to his satisfaction, may be waived by the owner by accepting the premises as under a completed contract. *Smith v. Alker*, N. Y. Ct. of Appeals, March 26, 1886, East. Rep. 692.

7. CONTRACTS—*Lumber Contract—"Refuse" Lumber.*—Under a contract A. leased to B. certain timber lands, and B. undertook to cut and manufacture into lumber certain trees thereon. It was provided that A. should have the right to take "any part of the whole of the refuse lumber that might accumulate by manufacture." *Held*, that the clause referred to quantity and not to quality, and that A. had no right to cull the best pieces, but must take the refuse as a whole or any fractional part of the refuse. *Waterman v. Morrell*, S. C. Cal., Dec. 1885, Repr. 523.

8. CORPORATION—*Officers—Powers—Mortgage.*—In the absence of any provision to the contrary, contained in the charter of a corporation, it will be presumed that its president, secretary, and treasurer have the authority to make all necessary contracts in transacting the ordinary business of the corporation, within the legitimate scope, object, and purpose of its orginization, and the execution of a chattel mortgage of the property of the corporation for the purpose of procuring credit is an exercise of such authority. *Eureka etc. Co. v. Bresnahan*, S. C. Mich., April 8, 1886, N. W. Rep. 524.

9. CORPORATION—*Municipal—Negligence— Contributory—Damages.*—The duty of the authorities to keep the entire street and sidewalks, in the closely built-up portions of a town or city, in safe condition for travel by day and by night, is not the rule as regards country roads within the corporation limits. One claiming damages for personal injury resulting from negligence cannot recover, if his negligence contributed in any degree to the injury. Contributory negligence to defeat claim need not be material. Where in such suit there is no evidence of negligence on part of defendant the court should instruct the jury to find for defendant. *Monongohela City v. Fisher*, S. C. Penn., Jan. 4, 1886, Pitts. L. J. 305.

10. ———. *Contract—Construction—Religious Corporation — Trustee — Compensation—Services as Attorneys—Implied Promise to Pay for Services —Gratuitous Services—Religious Corporation—Action for Services—Evidence—Custom—Admis-*

sions of Trustees.—Corporations, whatever may be their character, are placed upon the same footing, in regard to their contracts and the implication upon which they may be based, as natural persons. An attorney at law who is a trustee of a church may be employed by his co-trustees to render professional services for the church, and become entitled to compensation therefor. The simple fact that services are rendered does not raise a liability on the part of the person for whom they are rendered, even though done at his request, if the circumstances are such as to repel the inference that compensation is to be made. When services are performed from kindly motives, and with charitable intentions, the law will not imply a promise to compensate for them. Where a trustee sues for services rendered a corporation, evidence is admissible to show that it was the custom of the corporation to pay for such services. The individual recognition of trustess of the right to compensation of one of them is not admissible, though their actions and admissions in their official capacity would be. *Cicotte v. Church of St. Anne*, S. C. Mich., April 15, 1886, N. W. Repr. 682.

11. CRIMINAL LAW—*False Pretenses—Indictment for Obtaining Goods by—Payment by Worthless Check*—Upon an indictment charging the defendant with obtaining goods by false pretenses, it must be shown, in order to convict him, that he not only made the false representations, but that he knew that they were false. Where certain sheep were sold to the defendant, with the understanding that he was to pay cash for them, and he gave a check representing that it was good, and the seller took it, relying on such representations, the check in fact being worthless, *held*, that the defendant was guilty of obtaining goods under false pretenses, and that, although the giving of the check in payment took place about an hour after the delivery of the sheep, that the delivery was made on the understanding that the payment was to be substantially simultaneous with the delivery, and that the delivery was conditional upon immediate payment. *Commonwealth v. Devlin*, S. C. Mass., April 1, 1886, N. E. Rep. 64.

12. ———. —*Second Conviction—Severer Punishment—Criminal Procedure—Judgment—Nullity—Erroneous Judgment*—A statute which prescribes as to certain crimes, that a second or a third conviction for these offences shall be punished more severely than prior punishments allowed is constitutional. Imprisonment under a judgment is not unlawful except the judgment be a nullity; it is not a nullity if the court has general jurisdiction of the subject, though it may be erroneous. *Kelley v. People*, S. C. Ill. January 25, 1886, Rep. 523.

13. CRIMINAL PRACTICE—*Witness—Examination—Repetition of Question—Juror—Competency of—Expression of Opinion Previous to Trial—Affidavits and Counter-Affidavits—Sickness of Juror.*—It is held in this case that the record discloses no reason why a witness should be asked to repeat the same thing which he had testified before, or why the same question should be put to him which had been put to him before. Objections to a verdict on the ground of incompetency of jurors for the reason that they had previously formed and expressed opinions are supported in this case by affidavits, and resisted by counter-affidavits of the jurors themselves, and of persons alleged to have been present at the times in question. These affidavits and counter-affidavits are reviewed, and the objection overruled. Mere *ex parte* affidavits alleging that jurors had previously formed and expressed opinions are a most unsatisfactory mode of establishing any such fact. The sickness of a juror for a short space of time, after their retirement from the bar, is not ground for setting aside their verdict, where the deliberations of a jury were entirely suspended until after the juror was so far restored that he could and did take part in their deliberations. *Hughes v. People*, S. C. Ill., March 27, 1886, N. E. Repr. 55.

14. DEED—*Unrecorded Deed—Purchase With Notice—Bankruptcy—Discharge—Effect of on Property of Bankrupt.*—A person having notice of an unrecorded deed conveying property to another, and who notwithstanding takes a deed from the former owner, cannot acquire title as against the holder of the unrecorded deed. The mere fact of a discharge in bankruptcy does not re-invest the bankrupt with property transferred to his assignee. *Oliver v. Sanborn*, S. C. Mich., April 8, 1886, N. W. Rep. 527.

15. EQUITY—*Jurisdiction—Specific Performance—When Vendee Cannot Maintain.*—Where any rights, which a vendee may have arising out of a transaction, can be protected by an action at law, specific performance ought not to be decreed. Where the alleged defects in the title to real estate were well-known to both parties at the time of the contracting for the sale thereof, and negotiations entered into in respect to such alleged defects, an agreement was executed which left it optional with the vendor whether she would bring an action for specific performance or not, should the vendee refuse to perform. The vendee did reject the title on a tender of a deed, and the vendor elected not to bring an action for a specific performance. *Held* that the vendee was in default and could not maintain a suit in equity to compel the vendor to give a full and perfect title. *Emrich v. White*, N. Y. Ct. of Appeals, April 13, 1886, East. Repr. 706.

16. ———. —*Specific Performance—Estoppel*—One who files a bill in equity for specific performance thereby vests the court of jurisdiction of the whole cause, and being entitled to full compensation for any damage to the land done during the pendency of the case, is estopped after decree executed by delivery of a deed from proceeding in a court of law in respect of such damage. Before receiving his deed and paying his money in pursuance of the decree, it is his duty to know the condition of the property. *Head v. Meloney*, S. C. Penn. January 4, 1886, Pitts. L. J. 335.

17. WHEN EQUITY WILL NOT RELIEVE—*Irreparable Mischief—Injunction*—Equity never interferes where there is a plain and adequate remedy at law; and the mere allegation in a bill that irreparable damage will ensue, is not sufficient, unless facts be stated which will satisfy the court that the apprehension of such injury is well founded. *Blaine v. Brady*, S. C. Md. October Term, 1885, Adv. Sheets.

18. HUSBAND AND WIFE—*Trust Deed—Husband as Agent of Wife.*—Where a married woman carries on business under a deed of trust and the husband who manages the trust for her, makes contracts with parties who know that he is dealing for the trust and acting only as the agent of his wife, these facts specifically pleaded will constitute *prima fa-*

cie a good defense to an action brought against the husband individually. *Noble v. Kreuzkamp*, S. C. Penn., January 4, 1886, Pitts. L. J. 308.

19. INJUNCTION—*Not Served—Effect of—Pending Negotiations of Parties—Forfeitures—Lease—Fixtures*—Both parties claimed certain property. The plaintiff had taken possession and the defendant had procured an injunction. Thereupon it was agreed that the defendant might retake possession; that the proceedings in chancery should be abandoned; that the rights of the parties should remain in *statu quo*, and that they should attempt to negotiate a settlement. The attempt was made but no settlement effected. *Held*, that neither party gained nor lost any thing pending the negotiations. The law does not favor forfeitures; it will not declare one upon implication; strict proof is always required; thus, the plaintiff's intestate leased to the defendant's grantors one acre of land for the purpose of building thereon a cheese factory; the buildings were erected, and the business of making cheese was continued for several years, down to and including the season of 1875. The lease contained this clause: "If, at any time said company wish to discontinue entirely and abandon said business, then I agree that for the space of one year said company, and after a vote of said company, may remove off of said premises all buildings." January 11, 1877, the company voted to sell the property, and February twenty-second, that the directors be permitted to run the factory at the expense of the patrons. It was sold at auction in August by a committee, one of which was the lessor, acting for the company. *Held*, that the vote did not indicate a purpose to abandon the business; that there was no forfeiture, and that the defendants had one year from August, 1877, to remove the buildings. *Waterman v. Clark*, S. C. Vt., February 20, 1886, East. Repr., 444.

20. INSURANCE—*Assignment of Life Policy—Bill of Sale—Mortgage—Fraudulent Transfer—Covenant—Statute of Limitation*—By the acts, chapter 9, Laws of 1862, and chapter 200, Laws of 1878, the insured has the right to make a voluntary assignment of a life policy to his wife or children free and clear from all claims of his creditors. When a bill of sale, absolute upon its face, is attacked by creditors on the ground of fraud, and it turns out that it was given merely as security for the payment of a debt which was much less than the value of the property, that circumstance is itself a badge of fraud. Where a mortgage contains a covenant to pay a debt, an action will lie on the covenant any time within twelve years from the default. *Earnshaw v. Stewart*, S. C. Md. February 5, 1886, East. Repr. 475.

21. ———. *—Policy—Warranty—Representation—Practice—Motion for New Trial—Laches*—The Kentucky statute providing that statements and descriptions in a policy of insurance or in an application therefor are to be deemed a representation and not a warranty, policies must be presumed to be issued with reference to this statute, and, therefore, where a house is described as occupied as a family residence, and is so occupied at the time, the fact that it afterwards is no longer so used will not avoid the policy, for the words therein are merely a representation of its then use. A motion for a new trial must be made within the time prescribed by the statute after the rendering of the verdict unless unavoidably prevented, and the rule applies where a special verdict is rendered and the court reserves its judgment thereon; a party cannot wait until after judgment, and compute the statutory term therefrom. A jury gave a special verdict; neither side moved for a new trial, but both moved for judgment. The court held the case and did not give judgment until nearly four months after the verdict. *Held*, it was then too late for the defeated party to move for a new trial. *Imperial Ins. Co. v. Kiernan*, Ky. Ct. of App., December 17, 1885, Rep. 528.

22. JURISDICTION OF SUPREME COURT—*Causes Involving Less Than $5,000—Interest of Bonds—Claim of Appellants to Have Sued for Themselves and Others.*—An appeal from a decree passed in a suit by one or more bondholders to recover interest on mortgage bonds, such interest amounting to less than $5,000, will not be entertained by the Supreme Court, according to the rule essablished in Elgin v. Marshall, 106 U. S. 578; s. c. 1 S. C. Rep. 484. It does not affect the jurisdictional limit favorably to the parties appealing that such parties sued for themselves and all others in like situation, who might join with them, unless, as a matter of fact, such others did join. *Bruce v. Manchester, etc. Co.*, S. C. U. S. April 5, 1886, S. C. Rep. 849.

23. MORTGAGE—*Bona Fide Holder of Note—Protection by the Law—Assignee of Mortgage—Rights as Against Purchaser for a Small Consideration of an old Judgment Levy.*—A person obtaining negotiable paper for a valuable consideration, and before maturity, is protected in its acquisition, unless it was obtained in bad faith, and the mortgage security in such a case is protected equally with the note. A new security having been given and accepted after a levy made, there having been no return of the execution made by the sheriff, and the levy having been considered discharged and the judgment paid, and so marked on the abstract of title to the property concerned before a mortgage thereon was assigned to the plaintiff, a subsequent purchaser of such levy for a small consideration cannot set up against the rights of the plaintiff, a prior right of redemption. *Barnum v. Phenix*, S. C. Mich. April 8, 1386, N. W. 577.

24. NEGLIGENCE.—*Nuisance—Landlord and Tenant—Instructions to Jury—Parent and Child—Damages.*—One who erects a fence adjacent to a street in an insecure and unsafe manner, or permits the same to become insecure and unsafe, and it falls upon and injures a person standing upon the street, is liable for the damages thereby occasioned. In such a case, the fact that the originator of the nuisance, who occupied the premises as tenant, had a few days prior to the accident, surrendered them to the landlord, does not relieve him from the consequences of his negligence. The court may give instructions of its own to the jury, or explain the effect of those granted at the instance of counsel, provided they are not inconsistent therewith. Travelers upon a public street have the right to assume that structures erected adjacent to the street are not unsafe to passers-by or in danger of falling; and it is not negligence for a person to stop for a few moments upon the street, whether from curiosity or otherwise. In awarding compensation to a parent for loss of his daughter's services, on account of injuries caused by defendant's negligence, the jury may consider

how far the injuries are permanent, and may affect the child's ability to render services for the parent until she will arrive at the age of twenty-one years. *Hussey v. Ryan*, S. C. Md., Jan. 15, 1886, East. Rep. 457.

25. ——. *Fellow-Servant—Master and Servant.*—A brakeman employed in dropping cars into a railroad company's yard, is a fellow-servant with a repairman employed in making repairs to cars standing on the tracks in the same yard, in such sense that the common employer is not responsible to one for injury caused by the negligence of the other; though the two branches of the work of the yard, the shifting of cars, and the repairing, were carried on separately under the charge of distinct foremen. It is the duty of an employer to furnish his employees with such means and appliances as are suitable for the work in which they are employed, and at the same time reasonably necessary for their safety, including a reasonably safe place to do the work. An employee seeking to recover damages from his employer for an alleged violation of the duty stated above, with regard to the place of working, must prove affirmatively that the employer neglected to provide such a reasonably safe place. In this case *held*, that the evidence does not show such negligence, and the case was properly withdrawn from the jury. *Campbell v. Pa., etc. R. R. Co.*, S. C. Pa., April 28, 1886, Pitts. L. J.

26. ——. *Special Findings — Legal Inferences.*—Where in actions for negligence a jury find the facts specially, it is the duty of the court to draw the inferences as to negligence. Where the driver of a street car was signalled to stop, and slackened his speed in response, a premature starting forward of the car by the driver is negligence; it is not contributory negligence for the passenger to attempt to get on while the car is moving slowly. *Conner v. Citizens, etc. Co.*, S. C. Ind., Jan. 26, 1886, Rep. 526.

27. NEGOTIABLE PAPER.— *Partnership.*—A pledge of negotiable securities for an antecedent debt, not being founded upon a present valuable consideration, is to be taken subject to the equities existing between the pledgor and third parties. The doctrine of "bankers' liens" not recognized in Pennsylvania. One Marshall, a member of a limited partnership, received by way of dividend a note of the company, agreeing to repay it to the company within thirty-four days, if called upon, and pledging as collateral for the re-payment four negotiable certificates representing four hundred tons of pig iron. Prior to this the certificates had been left by Marshall in bank, and on receiving the note he had it discounted, still leaving the certificates in the bank, and subsequently agreeing that the bank might hold them as general collateral for all his indebtedness. The bank had no notice of the agreement with the limited partnership. *Held*, that the agreement of Marshall to re-pay the amount of the note to the limited partnership, not being founded on any consideration, was void, and that Marshall would dispose of the certificates as he saw fit. *Liggett, etc. Co.'s Appeal*, S. C. Pa., Jan. 4, 1886, Pitts. L. J. 345.

28. —— ——. *Promissory Note—Laches—Waiver.*—Where a promissory note is made and dated at a particular place, and the maker is a resident of and does business in another State: *Held*, 1. That in the absence of a named place for payment the note is payable at the maker's residence or place of business, where presentment must be made in order to hold indorsers. 2. That under such circumstances a person who takes such note by indorsement, if he proposes to hold the indorser, takes it with the knowledge that at its maturity a proper demand must be made on the maker for payment, and he is under obligations at the time he receives it, or in due time afterwards, to know, or at least inquire, where the maker lives. Where an indorser with full knowledge of the fact that a promissory note had been presented for payment at the place where it bears date, instead of the maker's residence or place of business, and protested for non-payment, obtains forbearance under a promise to pay: *Held*, that such a promise was a clear waiver of the laches of the plaintiff, and neither presentment, demand, protest nor notice need be shown. *Oxnard v. Varnim*, S. C. Pa., Jan. 4, 1886, Pitts. L. J. 346.

29. LIMITED PARTNERSHIP. — *Special Partner—Change of Capital — Cash Payments — Illegal Preference—Evidence.*—Under art. 72 of the Code relating to limited partnerships, a change in the amount of capital contributed by a special partner to the firm creates a new partnership, and the formalities pointed out by the statute must again be complied with in order to protect the special partner from liability as a general partner. The amount contributed by a special partner must be in actual cash payments, that is to say, the special partner must pay his money into the common stock and leave it there to the risks of the business. The payment and devotion of the money to the business of the firm must be actual and absolute, not apparent and illusory, otherwise the special partner will be held liable as a general partner for the firm debts; and this result cannot be avoided by the good faith and honest intentions of the partners to comply with the statute. If a firm is actually insolvent and knows it, or by the exercise of reasonable diligence could know it, and deliberately conveys a portion of its property to one of its creditors, and thereby pays in full that creditor's claim, the necessary effect is to prefer that creditor, and from such an act the law conclusively presumes the intent to prefer; and when a special partner is a party to such a transaction he becomes liable as a general partner. When the law imputes the intent from the acts done by a party, his testimony as to what his intention was in doing the acts cannot be received in evidence. *Lineweaver v. Slagle*, S. C. Md., Jan. 29, 1886, East. Rep. 467.

30. PROMISSORY NOTE. — *Surety — Subrogation—Replevin—Complaint—Allegation of Assignment.*—A party who executes a note as surety with the maker thereof, such note being given for the purchase of a buggy, is, upon being required to pay the note, subrogated by such payment to the rights of the drawee, and is entitled to the possession of the buggy. In such case the surety suing in replevin for the buggy need not allege an assignment in his complaint. *Myres v. Yaples*, S. C. Mich., April 8, 1886, N. W. Rep. 536.

31. REAL ESTATE—*Replevin—Title to Land From Which Logs are Cut—Right to Possession*—Where A. purchases lands levied on and sold under an execution against B., and B. at the time of the levy having no title to the land, but subsequently acquiring title thereto, such subsequent

acquisition of title will not enure to the benefit of A., so as to make the levy under which he purchased good by relation, and he will not be entitled to the possession, and cannot maintain a suit in replevin for logs cut on such lands by A. and sold to other parties. *McArthur v. Oliver*, S. C. Mich., April 15, 1886, N. W. Rep. 689.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

45. In city of the fourth class, organized under charter granted to such cities by Revised Statutes of 1879 of Missouri, in case of a tie in vote for Mayor, have board of Alderman, under § 4937 Rev. Stat. of Mo., the power to contest the election by casting out votes which are proven to be illegal? Have they the power to go behind the return of the judges of the election and decide on the illegality of votes? S. W.

QUERIES ANSWERED.

Query 44. [22 Cent. L. J. 454.]—In Missouri a suit is brought, and attachment sworn out. Plea to the jurisdiction is raised and sustained. The grounds of the attachment are not examined into. Suit is brought for damages on the attachment bond. Can defense be made that there were good grounds for the attachment? See Drake on Attachment, 5th ed., §§ 170 a. and 409. Want the law as applicable in Missouri. ***

Answer:—"Can defense be made that these were good grounds of attachment?" No. Without knowing if the want of jurisdiction was of the person or subject matter, it is immaterial, so far as the right to sue upon the bond is concerned, how the attachment proceeding was dismissed, whether for want of jurisdiction, quashed of the writ, by non-suit or other abandonment of the writ. The defendant's remedy upon the bond arose the moment its condition was broken. It is held in 56 Mo. 226-230 that the failure of plaintiff to successfully prosecute his action will *per se* subject him to liability therefor on his bond, and the conditions of his bond are deemed broken if from any cause the suit is not prosecuted without delay and will effect, whether any plea in abatement be filed or not. To defend, by way of showing that the ground of attachment were good, would be but an indirect mode of supporting an issue which the bond required should have been done directly in order to escape liability. The defendant's cause of action depends upon the fact that the condition of plaintiff's bond was broken, not upon how it was declared broken. It is too late now to offer to prove by way of defense, matters that plaintiff was precluded from showing by reason of a jurisdictional fact. In some States damages are awarded upon the bond in the same proceeding, and immediately upon a dismissal of the attachment. Were such the rule here it will not be insisted that, upon an inquiry of damages after dismissal of the writ of attachment, the plaintiff would be allowed to show what the judgment of the court in the first instance, decided he failed to show. I offer these crude observations in reply for what they are worth. H. Q. B.

Kansas City Mo., May 8.

RECENT PUBLICATIONS.

THE ADJUDGED CASES ON DEFENCES TO CRIME. VOL. IV. Including special defences to crimes against the public, viz: Crimes against the laws of nature; against the government; against public justice; against the public peace; and public nuisances; also certain crimes against the property of individuals, as Arson, blackmailing and threatening; burglary and embezzlement. With notes. By John D. Lawson, San Francisco: Sumner Whitney & Co., Law Publishers and Law Book Sellers. 1885.

In a former number of this journal (Vol. 21 p. 516) will be found a notice of the third volume of this series. In it is pointed out the defects of the plan upon which the work is constructed, the fact that it is and professes to be one-sided, that it does not give the cases upon which a prosecution might well rely in such cases as those in which successful defences have been made, and therefore that the work is misleading and may land the lawyer, who relies upon it, in traps of which he had no prevision. While this is true enough, it may be said on the other hand, that the work cannot fairly be judged as (what it is not and does not profess to be) a complete body of criminal law, but only as what it *does* profess to be a body of defences that can be made in certain given cases or in cases analogous to them. Forewarned is fore-armed, and as the reader can learn from the title page itself, that the work does not profess to enable the advocate to meet every case that can be brought forward against his line of defence, he can only blame himself if he trusts this work as containing *all* the law applicable to the cases in which he proposes to use it. The work does not profess to do this, if it did, it would be swollen to utterly unmanageable dimensions. It will be found useful however, in furnishing cases in which certain defences have been found sufficient and available, not only in identical cases but in numerous other analogous cases. For example on page 550 we find this principle of law in the head note: "Where the victim of a conspiracy is himself endeavoring to do an unlawful act, there can be no conviction." In this case the "victim" as he is tenderly called, paid good money for boxes which were represented to him as containing counterfeit money with the view of uttering such counterfeit money. The boxes contained only saw-dust. The prosecution of the saw-dust men for conspiring to obtain the victim's good money in exchange for their supposititious bad money, failed because the victim was in the transaction, at least as vicious as the defendants, and the case was not within the statute upon which the prosecution was founded. The defence is manifestly available, and the ruling is authority in many classes of cases in which the biter is bitten. And as the opinions are given in full and the courts cite and discuss the cases adverse to the conclusions to which they arrive, much of the one-sidedness, which at first blush appears in the plan of the work will be found to disappear.

This book, like all Mr. Lawson's other works, displays thorough knowledge and diligent investigation of the subject in hand, and will doubtless prove of great value to the counsel for the defence.

AMERICAN STATUTE LAW. An Analytical and Compared Digest of the Constitutions and Civil Public Statutes of all the States and Territories Relating to Persons and Property, in force January 1, 1886. By Frederick J. Stimson. Boston: Charles C. Soule, Law Publisher. 1886.

The task of bringing into one view and embodying in a single volume all the statute law of the several States and Territories, relating to persons and prop-

erty, is an undertaking so vast that it might well "give pause" to the most ardent, enterprising and laborious of students. Mr. Stimson has manifestly felt the magnitude of the task he has assumed, and has used every available means to lessen his labors and promote the symmetry of their result. His divisions and subdivisions of his subject are well considered, and the system manifested in his arrangement of the immense mass of material with which he had to deal, indicate very clearly, not only that he was fully impressed with the importance of his subject, but that he was conscious of his ability to achieve his task to his own satisfaction, and that of the profession for whose use the volume has been prepared. The result is now before us in a large royal octavo volume (of most commendable typography), in which is to be found faithfully collated all the statute law of all the States brought down to date, and all so conveniently arranged that the existing law upon any given subject, of any one of the States can be found as easily as in the "Code" or "Revised Statutes" or "Compiled Laws" of that State.

It is hardly necessary to say that this volume will be of immense value to practitioners throughout the Union.

JETSAM AND FLOTSAM.

VERDICT OF A JURY IN A JUSTICE'S COURT.—We under sinded jurors Retorn a verdict do here by agree that John Smith thomas Jones both gilty of sal & batry th at they are find one dolar a peas a and each poy half of the cost. HENRY SIMPSON
forman

Jones, it may be remarked, was the prosecutor.

NO LOCUS PENETENTIÆ.—An attorney who was stricken from the roll, on being sentenced to six months' imprisonment for fraudulently obtaining money from a poor woman, seven years afterwards applied to be re-instated. He presented a certificate of good character from the solicitor with whom he had served as managing clerk, and a numerously signed memorial in his favor. The Incorporated Law Society opposed the application and the Queen's Bench refused to re-instate the applicant, saying, that there might be occasional exceptions, but, as a general rule, a man once struck off the roll was not to be restored to it. The English courts, it seems, do not follow Dr. Watts:

"While the lamp holds out to burn,
The vilest sinner may return."

AT THE Liverpool County Court there was a dispute with a dressmaker about the fit of a certain bodice. The plaintiff, who refused to take it, alleged it was too short, and too much padded. The dressmaker stated that bodices were now cut short on the hips, and that as to the padding it was necessary, on account of the lady being deficient in the place where the padding was placed. The plaintiff did not desire to have her figure improved by the dressmaker, she was quite satisfied with it as it was. The question of misfit or fit appeared to be incapable of decision, till at length the dressmaker claimed that it should be put on. The plaintiff at last consented to do so, and adjourned for that purpose. On her return the judge and court proceeded to criticize the fit. The judge at last made a suggestion—such a suggestion, just like a man—that surely the fault of the bodice being too short might be remedied by bringing the dress higher up; but then his honor appears to have forgotten all about the ankles. —*Gibson's Law Notes.*

DOMESDAY BOOK.—The Royal Historical Society has appointed a committee to make arrangements for the celebration of the 800th anniversary of the completion of the great survey of England contained in Domesday Book—which was, almost certainly finished in the year 1086 A. D.—and has invited the leading antiquarian and architectural societies throughout the country to take part in the celebration. The invitation has been accepted by most of the societies, including the Society of Antiquaries and the Royal institute of British Architects, which have appointed delegates to serve on the committee. Any person interested in Domesday Book, or any learned society to which by chance an invitation has not been sent, may communicate with the Hon. Secretary, Mr. P. Edward Dove, Barrister-at-law, 23 old buildings, Lincoln's Inn., London. *Law Journal, Eng.*

The hangman of Vienna, a man named Heinrich Willenbacher, died on March 13, in his 51st year. He had held his office for 24 years, and during that time had executed 36 criminals. This is not a large number for a city with a million of inhabitants; but murders, and, indeed, all crimes of violence are of rare occurrence in Vienna, the manners of the inhabitants being proverbially gentle—*Irish Law Times.*

A young barrister who was rather given to browbeating, had a favorite mode of mortifying a witness, by saying: "Well, sir, I shall only ask you one question, and I do not care which way you answer it." Mr. Brougham, who was on the same circuit, accosted his friend one morning as follows: "Well, I have only one question to ask you, and I do not care which way you answer it: How do you do to-day?—*Ibid.*

A CURIOUS VERDICT.—Probably one of the most curious and remarkable cases on record of a verdict rendered by a jury and sustained by the court against the evidence produced on the trial has just been disposed of by the Queen's Bench in England. It was a suit against an accident insurance company that refused to pay a policy on the ground that the person insured had killed himself. The latter was a commercial traveller who had met his death while a passenger on a Great Eastern train. Besides himself there were but two persons—a young girl and her brother—in the car in which he was travelling. They testified that between the two named stations, he suddenly got up from his seat, arranged his papers, put his head out of the window, looked up and down the road, then opened the door and jumped out. When found he was insensible and soon after died. There was no other direct evidence. The two eyewitnesses who testified as above were not contradicted; they were not impeached. Nevertheless the jury found that the man had not deliberately jumped out of the car, and accordingly rendered a verdict against the company. This verdict might be explained on the theory that corporations are often mulcted by juries without regard to the weight of evidence. But the most curious aspect of the case is the view taken by the appeal judges who sustained the verdict. Justice Stephen believed that "there was a strong antecedent probability that the man would not commit suicide," while Justice Grove thought it "inexplicable that a person should kill himself in the manner and under the circumstances described by the two witnesses." Neither judge questioned the veracity of the witnesses, but both thought that "they must be mistaken in their observation." The theory of the court was, that the man had not jumped out of the car, but had accidentally fallen out, and on this ground the verdict was sustained.—*Exchange.*